Petition

Office - Supreme Court, U.S.
FILED
FEB 12 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

81-1520

Term, 1982

No. _____

TELESFORO BAUTISTA,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Has Petitioner not been deprived of his right to Due Process of Law under the Fourteenth Amendment of the United States Constitution by virtue of the presentation of compound-prejudicial and essentially irrelevant evidence presented to the jury for the purpose of inflaming their passion and for no probative value whatsoever?

2. Has not the Petitioner been deprived of his rights to Due Process of Law under the Fourteenth Amendment of the United States Cosntitution by the participation in the determination of his guilt or innocence by two jurors who had been clearly tainted by "at bench" proceedings involving prior felony convications of Petitioner and by "at bench" discussions of the difficulty in convincing the jury of Petitioner's position?

3. Was not Petitioner deprived of his rights to Due Process under the Fourteenth Amendment of the United States Constitution and against cruel and/or unusual punishment under the Eighth Amendment of the United States Constitution by virtue of his sentencing to consecutive periods of time for what was essentially one, unified criminal act?

4. Are not California Penal Code §§286 and 288a unconstitutional as violative of the guarantees of Due Process of Law and rights of personal privacy embodied in the Fourteenth Amendment of the United States Constitution and the penumbra of the entire Bill of Rights?

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Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

_____

Jurisdictional Statement

Petitioner, Telesforo Bautista, prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of California which denied a Petition for Hearing to review Petitioner's criminal convictions. Said Petition was denied on November 12, 1981 by postcard annexed here-

to as Appendix "A" and incorporated herein by reference as though set forth herein in full. Pursuant to California Rules of Court, Rule 24, annexed hereto as Appendix "B" and incorporated herein by reference as though set forth in full, such decisions of the Supreme Court of the State of California are not finally entered until 30 days after the date of the decision so that the decision sought to be reviewed was not finally entered until December 12, 1981. Therefore, pursuant to 28 U.S.C.A. §1257(3) and United States Supreme Court Rule 20, 28 U.S.C.A. this Petition is timely filed within 60 days after the entry of judgment sought to be reviewed below.

Proceedings Below

On January 30, 1980, after a jury trial in the Superior Court of the County of Los Angeles, State of California, Petitioner was found guilty and convicted of sodomy, oral copulation and false imprisonment and

was sentenced to state prison for a term of 6 years as to the first charge, 2 additional years as to the second charge and 8 months as to the third charge for a total of 8 years, 8 months.

Thereafter, a Notice of Appeal was filed with the Court of Appeal of the State of California on or about March 19, 1980 with the Court affirming said convictions on or about July 29, 1981. Thereafter, a Petition For Hearing was filed with the California Supreme Court, as aforesaid, and said Petition was thereafter denied as aforesaid.

Jurisdiction

The date of the final entry of judgment herein sought to be reviewed is December 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257(3).

Issues Presented

1. Has Petitioner not been deprived of his right to Due Process of Law under the Fourteenth Amendment of the United States Constitution by virtue of the presentation of compound-prejudicial and essentially irrelevant evidence presented to the jury for the purpose of inflaming their passion and for no probative value whatsoever?

2. Has not the Petitioner been deprived of his rights to Due Process of Law under the Fourteenth Amendment of the United States Constitution by the participation in the determination of his guilt or innocence by two jurors who had been clearly tainted by "at bench" proceedings involving prior felony convictions of Petitioner and by "at bench" discussions of the difficulty in convincing the jury of Petitioner's position?

3. Was not Petitioner deprived of his rights to Due Process under the Fourteenth Amendment of the United States

Constitution and against cruel and/or unusual punishment under the Eighth Amendment of the United States Constitution by virtue of his sentencing to consecutive periods of time for what was essentially one, unified criminal act?

4. Are not California Penal Code §§286 and 288a unconstitutional as violative of the guarantees of Due Process of Law and rights of personal privacy embodied in the Fourteenth Amendment of the United States Constitution and the penumbra of the entire Bill of Rights?

Constitutional and Statutory Provisions Involved

This case involves the Fourteenth and Eighth Amendments of the United States Constitution and California Penal Code §§286 and 288a.

Fourteenth Amendment:

"Section 1 ... No state shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws ... ."

Eighth Amendment:

"...Nor cruel and unusual punishment inflicted."

Ninth Amendment:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed ... ."

California Penal Code §286:

"Sodomy is sexual conduct consisting of contact between the penis of one person and the anus of another person." (Appendix "C")

California Penal Code §288a:

"Oral copulation is the act of copulating the mouth of one person with the sexual organ of another person." (Appendix "D")

Statement of the Case:

An Information (criminal pleading) was filed on May 16, 1979 in the Superior Court for the County of Los Angeles, alleging that Petitioner violated three counts of California Penal, to wit: §286 (sodomy); §288a (oral copulation) and §236 (false imprisonment). Thereafter, on May 16, 1979, Defendant was arraigned, pled not guilty and a cause came on for trial on January 8, 1980 before a jury.

On January 30, 1980, the jury returned its verdict of guilty on each of the aforesaid three counts, the jury found the

allegation "true" that force or violence was used to effectuate the criminal act alleged in Count Three (false imprisonment) and the Court, denying Petitioner's Motion For a New Trial, sentenced Petitioner to the State prison for the term of six years as to Count One (§286); two additional years as to Count Two (§288a); and eight months as to Count Three (§236) for a total sentence of eight years and eight months. Thereafter, a Notice of Appeal was filed with the Court of Appeal of the State of California and a Petition For Hearing was filed with the Supreme Court of the State of California with the former affirming the conviction and the latter denying said Discretionary Writ of Review as is hereinabove set forth.

That each and all of the Issues presented herein were raised at all stages of the proceedings in the state court systems with the exception of the constitutional attack on Penal Code §§286 and 288a.

Statement of Facts:

The prosecution's witness, Carroll, testified that she knew the alleged victim,

Patricia Judge, for approximately 15 years and further, knew her step mother, Diane Herrod. (Reporter's Transcript, Page 52; hereinafter referred to as R.T. p.52). That on March 8, 1979, Carroll had made plans to go out to dinner with Judge and waited until approximately 9:00 P.M. at the latter's residence for this purpose. Beginning to worry why Judge had not arrived at approximately 5:00 to 6:00 A.M. the following morning, Carroll was finally awakened by Judge's voice calling to her. When Carroll asked Judge where she had been, Judge allegedly replied, "I was raped." (R.T. pp.55-57, 123-124). Judge thereafter related that she had been the victim of sodomy and oral copulation by force and needed help. (R.T. pp.72-74, 148-149, 164).

Caroll was then allowed to describe Judge's appearance as "no expression and a type staring look with her hair matted down around her head." While Carroll thereafter suggested that the police be contacted, Judge allegedly stated that she was afraid of

retaliation from Petitioner in some fashion. (R.T. pp.75-76).

Since the alleged incident occurred, Carroll stated that Judge keeps a riffle near her bed and has subsequently changed all door locks in her apartment. Judge also has allegedly become irritable, quiet and during her sleep, has become very restless. (R.T. pp.110-113, 116, 132-140).

Thereafter, Gary Goldbard, M.D., testified that on March 9, 1979 he examined Judge and his examination revealed a one centimeter lineal rectal tear. (R.T. pp. 172, 173-175).

Diane Herrod, the step-mother of alleged victim Judge, testified that she received a telephone call from Judge at approximately 10:00 A.M. on March 9, 1979 and that the victim was "quieter ... strained" during her one hour conversation. (R.T. pp.177-179). Approximately one week following the alleged occurrence, Judge went to Northern California to visit Herrod and

stayed for approximately one week. During this visit, Judge was observed to speak in a monotone and was often observed to be staring out into open space. Judge allegedly stated during this period of time that she had a fear of men. Judge further appeared irritable and snappy for no apparent reason, which was not the usual demeanor of Judge prior to the alleged occurrence. Herrod further stated that Judge allegedly wanted to go visit Herrod due to the fact that Judge wanted to reside in a security complex. (R.T. pp.231-234, 248-249, 265).

Marvin Schwartz, M.D., testified that he examined Judge as part of his professional specialty in obsetrics and gynecology on April 23, 1979 due to complaints of abdominal pain. Upon finding nothing physically wrong he formed the opinion that she had undergone some tramatic incident causing emotional stress. He further testified that emotional shock could manifest itself in certain behavior where the victim cannot sleep,

becomes withdrawn, quiet and slow to react. (R.T. pp.251-255).

Terence Judge, brother of the alleged victim Judge, testified that he works as a Deputy Sheriff for the Los Angeles County and was so employed on March 9, 1979 when he spoke to his sister after having received a message from her of an emergency nature. His telephone conversation with her revealed that she spoke very slowly, in a monotome type of voice and would cry at different intervals. She allegedly told him that one reason she didn't want to go to the police was due to the alleged threats made by her assailant. (R.T. pp.272, 273-274, 279).

The alleged victim Judge thereafter testified that she met Petitioner when she was visiting a friend who worked in a business next door to that where Petitioner was employed and that this occurred in late 1978. (R.T. pp.329, 330-331, 333-335). Thereafter, in January, 1979, she allegedly received a telephone call from Petitioner

wherein he requested to meet and talk to her and indicated that he was very upset with regard to the marital difficulties he was then facing. Petitioner then allegedly offered her money if she would simply see him, she declined and the conversation ended. (R.T. pp.335-338).

Thereafter, on March 8, 1979, at approximately 7:30 P.M., Judge received another telephone call from Petitioner wherein he advised that their mutual friend had been killed in a motorcycle accident. Petitioner indicated he was very upset and wanted to see Judge to talk about same. Judge indicated that she was also upset but agreed to meet Petitioner. Petitioner allowed Judge to select the meeting spot and she suggested that they meet at a bar where in fact they thereafter did meet. (R.T. pp.339-342).

During the course of the meeting of Petitioner and Judge at the bar, Petitioner allegedly continued to tell Judge that he was in love with her, that he was possessed

of large sums of money and continued to offer Judge cars and large sums of money if she would stay with him. Allegedly, Judge continued to decline these offers and only agreed to leave the bar and go for a drive with him upon him raising his shirt and showing her a gun "in a non-menacing gesture." (R.T. pp.343-345, 346-348, 448).

They thereupon left the bar together and travelled in Petitioner's car with the gun allegedly placed on the front seat between the victim and Petitioner. They stopped at a convenience market where the Petitioner exited the vehicle, purchased a cup of coffee for Judge and returned to the vehicle with it for her. Upon Petitioner's suggestion that the two of them visit a local motel, Judge allegedly declined and then assented only when Petitioner became insistent. They arrived at the motel and Petitioner exited the vehicle, requested a room, obtained a key and only then did Judge exit the vehicle and follow Petitioner

to a room. (R.T. pp.355-358, 360-363).

Upon entering the roon, the Petitioner and Judge viewed some x-rated movies and while pointing the weapon at her, Petitioner instructed Judge to remove her clothing. (R.T. pp.367-369). After allegedly receiving verbal threats to the welfare of Judge, Judge removed all of her clothing. (R.T. pp.371, 374-376, 468). Petitioner then allegedly instructed Judge to lie on the bed, tied her hands behind her back and tied her ankles with a towel. He thereafter allegedly sodomized her and ordered her to orally copulate him. Petitioner then allegedly handed Judge $8.00 for her taxi fare home and Judge left the room. However, she went to a convenience market a short distance away, purchased a cup of coffee and while there noted that the Petitioner had returned. He motioned to her to get into his car and she voluntarily complied. The Petitioner then drove her home. (R.T. pp.384-389, 394-395, 397-398, 400-401, 473, 402-404).

Judge testifed that after the alleged occurrence, she obtained a gun and would only go out on errands during the daylight hours, was irritable, and often slept much more than prior to the alleged incident. She also alleged that she had deadblot locks installed on all of her doors. (R.T. pp. 408-413, 475).

Thereafter it was stipulated by and between counsel for Petitioner and counsel for the People of the State of California that the gun held by Petitioner on the night he was allegedly with victim Judge was, in fact, a replica and not a true working fire-arm. (R.T. pp.417-418).

Petitioner thereafter testified on his own behalf and verified the fact that he had had a conversation with Judge in January, 1979 where he had offered her money to become involved romatically with him. At that time, she simply stated that she would think it over and they did not speak again until March, 1979, during which time Petitioner was having

extreme marital difficulties. (R.T. pp.650-651). Petitioner then further admitted telephoning Judge to advise her of the death of their mutual friend and again proposed that the two of them become involved romatically. At this time, however, Judge stated that she would accept his proposition and suggested that they meet at a local bar located near her residence. (R.T. pp.652-653).

Petitioner and Judge thereafter left the bar and travelled to an x-rated motel where he displayed the replica weapon to Judge in no menacing gesture whatsoever but only to indicate to her that he possessed same due to the large amounts of money he often carried. Petitioner denied ever pointing the gun at Judge or forcing her to do any act that was non-consentual. (R.T. pp.659-660, 661-664, 688, 694, 716).

After watching some x-rated films, Petitioner and Judge engaged in consentual sodomy and oral copulation while trying to

emulate the action on the television screen. After ending the sexual encounter with Judge, Petitioner attempted to secretly vacate the premises because he was not possessed of the amount of money he had promised to pay Judge for this sexual encounter. (R.T. pp.665-666, 702-703, 667-668, 669-680). Petitioner was unsuccessful in his efforts to escape undetected and, instead, Judge left the room to get some coffee. Deciding that it was imperative that he assist her due to the lateness of the hour, Petitioner also left the room and drove his vehicle to pick up Judge. Judge then indicated that she was angry with the Petitioner due to his misrepresentation of the funds he had promised her and that she had family in the police department whom she would contact if he did not pay h[illegible] once. (R.T. pp.670-671, 693).

Reasons For Granting The Writ:

1. THERE WAS A LACK OF SUBSTANTIAL EVIDENCE PRODUCED HEREIN TO SUPPORT THE CONVICTION AND THE EVIDENCE PRESENTED BY THE PROSECUTION WAS SO INFLAMMATORY THAT ITS PROBATIVE VALUE WAS CLEARLY OUTWEIGHED BY ITS EXTREMELY PREJUDICIAL EFFECT.

In passing upon the admissibility of evidence, it is axiomatic that the trial court must balance the probative value of that evidence offered against the possibility that its admission will surprise or prejudice the party, distract the jury, or consume undue time. Lyda v. U.S., 321 F.2d 788; U.S. v. Hearod, 499 F.2d 1003.

Additionally, it is equally axiomatic that as the Court held in In Re Windship, 397 U.S. 358, 364; 90 S.Ct. 1068, 1073:

> "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicity hold that the Due Process Clause protects the accused against conviction

except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

It is respectfully submitted that upon review of the sorry record herein, the insufficiency of the evidence to support a finding of guilt is all too patently obvious. It is apparent that Petitioner enjoys a sexual encounter and that his sexual proclivities may reside outside the mainstream. However, it is equally apparent that Petitioner did not become violent or use any degree of menace or force upon Judge but that she consented to the sexual encounter and only raised objection when it was discovered that Petitioner had allegedly misrepresented his financial condition and ability to pay her for her services. There are no inconsistencies in Petitioner's version of the events in question and the inconsistencies apparent in Judge's version of the events are unmistakable. Judge avoided any contact with law enforcement

after the alleged "violent attack" on her for approximately one day, she voluntarily accompanied Petitioner to the motel, made no effort to flee when he exited the vehicle to obtain a room, voluntarily accompanied Petitioner to that room, made no efforts to flee when she was physically distant from Petitioner on two occasions at a convenience market, voluntarily returned to Petitioner and his vehicle on both occasions, voluntarily allowed Petitioner to drive her home and made no immediate complaint to any authority figure. It is apparent that Judge engaged in her sexual encounter with Petitioner by means of no force or coercion whatsoever but in the expectation of financial reimbursement which did not occur. The absence of such obviously triggered Judge's hostility and her patently false accusations against Petitioner. This is simply not consistent with the Due Process standard requiring proof beyond a reasonable doubt and this sorry record is possessed of nothing more than evidence which may raise

some suspicion but is clearly not sufficient to support any conviction whatsoever.

Additionally, it becomes further apparent that the prosecution herein was guilty of serious misconduct and the Court below of serious error in allowing inflammatory evidence whose probative value was far exceeded by its prejudicial effect. This was not a piece of civil litigation wherein the issue of damages (i.e., mental distress) was at issue. However, the entire thrust of the prosecution was to arouse the passion, prejudice and sympathy of the jury and the Court allowed evidence of Judge's keeping a rifle near her bed, having the doors to her residence deadblot-locked, of her change in psychological and emotional make-up by virtue of her becoming irritable, very quiet, unlike her previous manner, sleepless and yet sleeping more than usual. Over Petitioner's Motion For a Mistrial based upon the production of such evidence, Petitioner was subjected to the admissibility of such

evidence and his ultimate conviction. (R.T. pp.115-117).

That further, witness Herrod, was allowed to recount the allegedly objective manifestations of the alleged victim's trauma and repeated the hearsay statement of Judge that she now had a fear of men and often became very irritable and snappy for no apparent reason. (R.T. pp.197-199, 232-234, 248-249). It is to be noted that witness Herrod did not even see Ms. Judge for approximately one week after the alleged incident and thus her testimonial observations of Judge's outward manifestations have little or nor probative value. Rather, they can only be deemed to have been admitted for the purpose of arousing passion and prejudice.

It is respectfully submitted that the Court gravely erred in admitting this extremely prejudicial evidence having little or no probative value and that by doing so, the Court allowed a violent contravention

of Petitioner's rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and the authorities, supra.

2. PETITIONER WAS FURTHER DENIED HIS RIGHT TO DUE PROCESS OF LAW BY THE FAILURE OF THE COURT TO DISQUALIFY JUROR CARON AND JUROR HARDY DUE TO PREJUDICIAL AND PRIVATE COMMUNICATIONS HEARD AND/OR OVERHEARD BY SAID JURORS.

It has long been recognized that as the Court held in Mattox v. U.S., 146 U.S. 140, 150; 13 S.Ct. 50, 53:

> "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden and invalidate the verdict at least unless their harmlessness is made to appear." (See also U.S. v. Doe, 513 F.2d 709).

That further, as we are taught by Professor Wright in his treatise, Federal

Practice and Procedure, Vol. 2, p.488, §554:

> "If a court officer or a juror has introduced an extraneous matter to the jury in its deliberations, and there is a possibility of prejudice from it, the verdict cannot stand."

Juror Caron admitted that he overheard proceedings "at bench" in which prior felony convictions of Petitioner were being discussed by the prosecution. Since Juror Caron was sitting in the back row of the jury box, it is at least possible that the taint may have spread to all of the other jurors in this matter. (R.T. pp.609-613, 617-628).

Juror Hardy, also admitted that she had overheard Petitioner's counsel state, at bench, "it's going to be very difficult to make this jury believe."

It is significant that Jurors Caron and Hardy felt that what they had overheard was important enough to bring same to the Court's attention and indicated that they thought they could make an independent

judgment despite same but that they apparently were not certain of such. (R.T. p.533).

That further, Petitioner brought to the Court's attention that regular "court watcher-audience members" were overheard loudly declaring "that guy should be in jail, he has no business being out on bail" and voicing their opinions about the case in front of the jurors while recessed in the hallway of the courthouse.

Clearly, the Court below erred in not granting Petitioner's Motion For a Mistrial due to the obvious taint of the proceedings by these extraneous matters and private communications.

3. PETITIONER WAS DENIED HIS RIGHT TO DUE PROCESS AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY VIRTUE OF THE SENTENCE IMPOSED HEREIN.

As this Court taught us in Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 597:

"... The amendment ... [Eighth] ... must draw its meaning from the evolving standards of decency that marks the progress of a maturing society."

It is respectfully submitted that the sentence imposed herein upon Petitioner violates his rights to Due Process of Law and his right against cruel and unusual punishment under the Eighth Amendment of the United States Constitution in that Petitioner was, in effect, sentenced to a term of 6 years for the alleged violation of §286 of the Penal Code (sodomy) and 2 years additional for an alleged violation of §288a of the Penal Code (oral copulation) when these were not separable, distinct acts. Rather, if they occurred at all, such were part of one, unified, single transaction and thus one, unified, single criminal act. It is Petitioner's position that both counts, amounted to merely one course of conduct and thus comprised an indivisible transaction engaged in with a single objective. There-

fore, any sentences imposed should run concurrently rather than consecutively and Petitioner should have only been punished once for this single transaction. Thus, Petitioner was both subjected to a violation of the Double Jeopardy Clause and the Prohibition Against Cruel and Unusual Punishments. See Weens v. U.S., 217 U.S. 349, 30 S.Ct. 544; Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417.

4. CALIFORNIA PENAL CODE §§286 AND 288a ARE UNCONSTITUTIONAL UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE RIGHT OF PRIVACY GUARANTEED UNDER THE BILL OF RIGHTS OF THE UNITED STATES CONSTITUTION.

As this Court so expressly taught us in Griswold v. Connecticut, 381 U.S. 479, 484; 85 S.Ct. 1678:

> "... Specific guarantees of the Bill of Rights have penumbras ... various guarantees create zones of privacy."

As this Court further taught in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705: the right of privacy extends to activities related to marriage, procreation, contraception, etc. That further, as this Court taught us in Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, the right of privacy extends to certain consensual activities which are pursued in private.

It is respectfully submitted that California's criminalization of aspects of human sexuality without a limitation imposed upon such criminalization that mandates punishment only if such is non-consensual or in public constitutes a violent contravention of the Rights of Due Process and Privacy under the United States Constitution.

Conclusion

The decision below is palpably erroneous and for the aforesaid reasons, this

Petition should be granted.

Respectfully submitted,

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Counsel has advised the California Attorney General's Office of the filing of this Petition by telephone on February 10, 1982.

Appendix

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

NOV 17 1967

I have this day filed Order

HEARING DENIED

In re: Ex Parte No. 37511

vs.

Bautista

Respectfully,

Clerk

cs

RULE 24. DECISION OF REVIEWING COURT

(a) (When decisions become final) All decisions of the reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the lower court or tribunal and to the parties. A decision of the Supreme Court becomes final 30 days after filing unless the court orders a shorter time or, prior to the expiration of the 30 day period or any extension thereof, orders one or more additional periods of time not to exceed a total of 60 additional days. A decision of a Court of Appeal becomes final as to that court 30 days after filing, except that the decision becomes final as to that court immediately after filing upon the denial of a petition for a writ within its original jurisdiction or a writ of supersedeas, without issuance of an alternative writ or order to show cause, or the denial of an application for bail or to reduce bail pending appeal, or the denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. When a decision of a Court of Appeal is final as to said court, it is not thereafter subject to modification or rehearing by said court. Where an opinion is modified without change in the judgment, during the time allowed for rehearing, such modification shall not postpone the time that the decision becomes final as above provided; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the date of modification. (7-1-73)

(b) [Filing consent to modification] If the reviewing court orders that a judgment be reversed and a new trial granted or that, in the alternative, the judgment be affirmed on condition that the party in whose favor judgment has been rendered consent to a remission of a portion thereof, or on condition that the party against whom the judgment has been rendered consent to an addition thereto, then, unless otherwise ordered, the judgment of reversal and granting of a new trial shall become final unless within 30 days after the filing of the decision two copies of a written consent by such party to the remission or addition shall be filed in the reviewing court. One of the copies shall be transmitted with the remittitur to the superior court.

§ 286. Sodomy; punishment

(a) Sodomy is sexual conduct consisting of contact between the penis of one person and the anus of another person.

(b)(1) Except as provided in Section 288, any person who participates in an act of sodomy with another person who is under 18 years of age shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year.

(2) Except as provided in Section 288, any person over the age of 21 years who participates in an act of sodomy with another person who is under 16 years of age shall be guilty of a felony.

(c) Any person who participates in an act of sodomy with another person who is under 14 years of age and more than 10 years younger than he, or * * * when the act is accomplished against the victim's will by means of force, violence, duress, menace, or * * * fear of immediate and unlawful bodily * * * injury on the victim or another person shall be punished by imprisonment in the state prison for three, six or eight years.

(d) Any person who, while voluntarily acting in concert with another person, either personally or by aiding and abetting such other person, commits an act of sodomy * * * when the act is accomplished against the victim's will * * * by means of force or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for five, seven or nine years.

(e) Any person who participates in an act of sodomy with any person of any age while confined in any state prison, as defined in Section 4504, or in any local detention facility as defined in Section 6031.4, shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year.

(f) Any person who commits an act of sodomy, and the victim is at the time unconscious of the nature of the act and this is known to the person committing the act, shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year.

(Amended by Stats.1975, c. 71, p. 133, § 7; Stats.1975, c. 877, p. 1957, § 1; Stats.1976, c. 1139, p. 5110, § 175, operative July 1, 1977; Stats.1977, c. 490, p. 1613, § 1; Stats. 1978, c. 579, p. 1983, § 16; Stats.1979, c. 944, p. —, § 6; Stats.1980, c. 915, p. —, § 1.)

Enhancement of prison term of offender under this section who was previously convicted of such offense, see § 667.6.

Failure to register as sex offender after conviction under this section upon subsequent release, type of offense and punishment, see § 290.

Firearm or deadly weapon, use or possession in commission of offense under this section, enhancement of sentence, see § 12022.3.

Infliction of great bodily injury in commission of offense under this section, additional punishment, see § 12022.8.

Minors committing offense under this section, presumption of unfitness to be dealt with under juvenile system, see Welfare and Institutions Code § 707.

Plea specifying punishment unavailable in case of violations of this section by force, violence, duress, menace, or threat of great bodily harm, see § 1192.5.

Probation or suspension of sentence prohibited for certain offenses under this section, see § 1203.065.

Sentence and punishment for violating provision of this section, number of enhancements not to be limited, see § 1170.1.

Soliciting commission of offense under this section, punishment, see § 653f.

Violation of this section as sex offense for purpose of school personnel discipline, see Education Code § 12912.

Youth authority, commitment to authority of 18-year-old sex offender with prior sex offense prohibited, see Welfare and Institutions Code § 1732.

Prospective application of Stats.1978, c. 579, to crimes committed on or after January 1, 1979, see note under § 182.

Asterisks * * * indicate deletions by amendment

1975 Amendment. Added subd. (a); rewrote former section as subd. (b)(1); and added subds. (b)(2), (c), (d), (e).

1976 Amendment. Deleted "for a period of not more than five years" following "in the state prison" in subd. (b); at the end of subd. (c) substituted "two, three or four years" for "a period of not less than three years;" in subd. (d) substituted "three, four or five years" for "a period of five years to life;" and in subd. (e) following "in the state prison," deleted "for a period of not more than five years."

1977 Amendment. Added subd. (f).

1978 Amendment. Substituted "three, six or eight" for "two, three, or four" years in subd. (c), and "five, seven, or nine" for "three, four or five" years in subd. (d).

1979 Amendment. Added the exception in subds. (b)(1) and (b)(2).

1980 Amendment. Substituted "or when the act is accomplished against the victim's will by means of *force*, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person" for "or who has compelled the participation of another person in an act of sodomy by force, violence, duress, menace, or threat of great bodily harm" in subd. (c); and substituted "when the act is accomplished against the victim's will by means of force or fear of immediate and unlawful bodily injury on the victim or another person" for "by force or violence and against the will of the victim" in subd. (d).

Derivation: Former section 286.1, added by Stats.1967, c. 1551, p. 3722, § 2.

Law Review Commentaries

Evidence of other sex offenses offered as part of the prosecution's case-in-chief. (1977) 25 U.C.L.A.Law Rev. 277.

Extending the right to sexual privacy. (1976) 2 West St.L.R. 281.

Legal position of homosexual persons in the United States. Rhonda R. Rivera (1979) 30 Hast.L.J. 799.

Rape and rape laws: Sexism in society and law. (1973) 61 C.L.R. 919.

Same sex marriage. (1973) 6 U.C.D.Law Rev. 275.

Sexual freedom for consenting adults. (1971) 2 Pacific L.J. 206.

United States Supreme Court

Crimes against nature, acts includable, see Rose v. Locke, 1976, 96 S.Ct. 243.

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1. Validity

In light of compelling state interest in protection of children from sexual molestation by persons who are materially more mature, and since definitions of age groups legislatively adopted were rationally related to state interest, classifications established by provision of this section redefining crime of sodomy, including making crime a felony when victim is under age of 14 and defendant is more than ten years older than victim, did not deny defendant equal protection by creating special class of crime that could be committed only by persons more than ten years older than victims under the age of 14. People v. Gonzalez (1978) 146 Cal.Rptr. 417, 81 C.A.3d 274.

2. Construction with other laws

Section 264.1, former § 286.1, and § 288b providing for an increased punishment of five years to life for a defendant who commits sodomy, rape or oral copulation either personally or as an aider or abettor while voluntarily acting in concert with another person by force or violence and against the will of the victim have the purpose of providing increased punishment where there is a gang assault and to insure that those who participate in such assault, either by personally stunging in the ultimate sexual act or by voluntarily helping others to accomplish it, received enhanced punishment. People v. Calimee (1975) 122 Cal.Rptr. 654, 49 C.A.3d 337.

Record in children's custody proceedings which established, inter alia, that mother had record of two criminal convictions, that mother was unemployed and had been through bankruptcy, and that mother was a homosexual living with a female companion in the same apartment that the children would live in was sufficient to sustain trial court's implied finding that an award of custody to mother would be detrimental to the children and that an award of custody to mother's parents who had provided children with the only permanent home they had known would serve the children's best interest. Chaffin v. Frye (App.1975) 119 Cal.Rptr. 22.

Where the two minor complaining witnesses at petitioner's 1959 sodomy and lewd conduct trial returned to Los Angeles from Virginia to testify in other trials procedure under Uniform Act to Secure the Attendance of Witnesses From Without The State in Criminal Cases (§ 1334 et seq.) was available but was not used by prosecution and there was no showing of existence of undue hardship because of psychological problem, it was error to permit the preliminary hearing testimony of the two children to be read at the trial and petitioner was entitled to have the 1959 judgment of conviction set aside in habeas corpus proceeding. In re Terry (1971) 95 Cal.Rptr. 31, 484 P.2d 1375.

Public solicitation to engage in consensual sexual conduct from which criminal sanctions have been removed is still subject to prosecution under subd. (a) of § 647. Op. Leg.Counsel, 1975 A.J. 1513.

3. In general

Defendant was not entitled to have attorney present when victims of alleged oral copulation by force and sodomy by force were shown photographs of all prisoners in cell block where alleged offenses took place where, at time photographs were shown, case was still in investigatory stage and defendant had not been charged with crimes nor was he a suspect other than to the extent that he was an inmate of the cell block. People v. Jones (1970) 88 Cal.Rptr. 871, 10 C.A.3d 237.

5. Definitions

The term "acting in concert" as used in this section providing for an increased punishment for a defendant who commits sodomy while voluntarily acting "in concert with another person" by force or violence or against will of the victim was intended to include both those who personally engage in the forcible sexual act and those who aid and abet that person in accomplishing it, and the quoted words as used in this section were not intended to require proof of prearrangement, planning or scheme. People v. Calimee (1975) 122 Cal.Rptr. 658, 49 C.A.3d 337.

6. Nature and elements of offense

Mere fact of one's having homosexual proclivities does not per se deprive him of legal entitlements and constitutional immunities; it is only the act or acts committed in the manifestations of an individual's homosexual orientation and proclivities that are forbidden under the law. Lipp v. Procunier (D.C.1975) 396 F.Supp. 871, supplemented 402 F.Supp. 623.

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6.5 Intent

Crime of sodomy requires only general and not specific criminal intent. People v. Gonzalez (1975) 146 Cal.Rptr. 417, 81 C.A.3d 274.

No more than a general criminal intent is required with regard to offenses of sexual perversion, simple kidnapping and sodomy. People v. Thornton (1974) 114 Cal.Rptr. 467, 523 P.2d 267, 11 C.3d 738, certiorari denied 95 S.Ct. 1118, 420 U.S. 924, 43 L.Ed.2d 393.

7. Consent

People v. Blagg (1968) 73 Cal.Rptr. 93, 267 C.A.2d 598 [main volume] appeal after remand 89 Cal.Rptr. 446, 10 C.A.3d 1035.

Consent is not a defense to sodomy prosecution. People v. Brown (1970) 86 Cal.Rptr. 149, 6 C.A.3d 619.

8. Accomplices

In sodomy prosecution in which 18-year-old boy upon whom sodomy was committed in jail testified that there had been no threats of immediate violence, that he feared that he would be subjected to violence and might even be killed, but that defendant's only threats had been that boy's protection from future attacks by other inmates would be removed and that if he told anyone of the offense, defendant would beat him, trial court, considering boy's age, background, sophistication, and maturity, could reasonably have inferred that boy did not consent to participate in the act but "assented" through fear of great bodily harm, and hence was not an "accomplice" within statute requiring corroboration of accomplice testimony. People v. Perez (1973) 108 Cal.Rptr. 474, 510 P.2d 1026, 9 C.3d 651.

Participation in crime induced by threats and fear of bodily harm removes one from accomplice category. People v. Brown (1970) 86 Cal.Rptr. 149, 6 C.A.3d 619.

Where daughter was taken into custody by juvenile authorities and policeman investigating case contacted the defendant who then fled state, flight constituted an implied admission by conduct and afforded an inference of consciousness of guilt constituting sufficient corroboration under § 1111 with respect to crimes of oral copulation and sodomy to which he claimed his daughter was an accomplice. People v. Hurd (1970) 85 Cal.Rptr. 718, 5 C.A.3d 865.

13. Consolidation of trials

Where codefendants made no extrajudicial statements implicating each other in charged offenses of oral copulation by force and sodomy by force, each defendant was represented by separate counsel, there was no conflict as to theory of trial and none of the defendants sought to waive jury, defendants were not entitled to separate trials at outset of trial. People v. Jones (1970) 88 Cal.Rptr. 871, 10 C.A.3d 237.

14. Habeas corpus

In habeas corpus proceeding to secure release of state prison inmate who had served nine years of term of not less than one year imposed following conviction of sodomy, in which record presented nothing from which court could determine whether inmate's offense was attended by conduct relatively less culpable than more so, there was no legally competent basis upon which to conclude that priority application of Adult Authority term fixing procedures and policies to inmate's case would result in administrative determination that inmate was being unconstitutionally imprisoned for term out of proportion to his individual culpability. In re Williams (1975) 125 Cal. Rptr. 457, 53 C.A.3d 10.

15. Double jeopardy

Where petitioners were charged by complaint with rape, oral copulation and sodomy but following preliminary hearing magistrate found that complainant had consented to acts of sexual intercourse and that acts of oral copulation and sodomy had not taken place but ordered petitioners held to answer for offense of statutory rape, defendants could not thereafter be prosecuted on information filed by district attorney charging them with rape, oral copulation and sodomy but not charging statutory rape. Jones v. Superior Court of San Bernardino County (1971) 94 Cal. Rptr. 289, 483 P.2d 1241, 4 C.3d 660.

16. Trial in general

People v. Blagg (1968) 73 Cal.Rptr. 93, 267 C.A.2d 598 [main volume] appeal after remand 89 Cal.Rptr. 446, 10 C.A.3d 1035.

In hearing on petition charging juvenile with two counts of sodomy and two counts of committing lewd and lascivious acts upon a child, even if juvenile's request for public trial had been made in timely fashion and his mother had joined in said request, court properly exercised its discretion by denying such request since it was necessary for two boys, aged nine and ten, to testify to delicate and revolting facts. In re McM. (1980) 164 Cal.Rptr. 199, 105 C.A.3d 187.

Sustaining of objections to questions asked defendant's parole officer, aimed toward corroborating defendant's testimony that his dealings with sodomy victim were to interest him in youth achievement program, was not prejudicial where victim and victim's aunt both corroborated defendant's testimony about the program. People v. Brown (1970) 86 Cal.Rptr. 149, 6 C.A.3d 619.

18.5 —— Hearsay, admissibility of evidence

Testimony that witness heard defendant talking to a small boy while seated in automobile of the same color as vehicle used in other sexual offenses against young boys and that he overheard the boy say that he did not have to get into the car to show defendant "where it's at" was admissible not only to establish identity and a similar modus operandi but also was nonhearsay circumstantial evidence from which jury could reasonably infer that the boy was rejecting an invitation to enter defendant's vehicle; furthermore, hearsay objection to entirety of such testimony was invalid. People v. Harris (1978) 149 Cal.Rptr. 860, 85 C.A.3d 954.

19. —— Other offenses, admissibility of evidence

Evidence of defendant's prior robbery conviction was properly admitted for impeachment purposes in subsequent prosecution for sexual molestation and robbery. People v. Harris (1978) 149 Cal.Rptr. 860, 85 C.A.3d 954.

In prosecution for sodomy, evidence of prior statement which was given by defendant in connection with a prior sexual incident and in which defendant claimed that girl involved in the prior incident had consented was inadmissible to impeach defendant's trial testimony in which he denied telling victim and the other girl that he had done it before and would get away with it, as content attributed to the prior statement, that defendant had stated done it before and would again get away with it, was not found in the statement. People v. Holbrook (1974) 117 Cal.Rptr. 801, 43 C.A.3d 636.

Where defendant testified in 1960 murder and robbery trial that he had been convicted in 1959 of sex crimes, there was evidence that he was convicted in 1947 of armed robbery and there was substantial evidence of defendant's guilt of first-degree murder and of robbery, admission of evidence of the 1959 conviction, which allegedly was invalid because of use of preliminary hearing testimony of witnesses outside the jurisdiction without making good faith effort to secure their attendance, was not prejudicial. In re Terry (1971) 95 Cal.Rptr. 31, 481 P.2d 1375.

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Note 19

Where evidence of other sex offenses was similar in nature and committed on same victim at a point close in time to the charged sex offenses and the evidence of commission of other offenses was not based solely on the uncorroborated testimony of victim but was substantially corroborated, evidence of other offenses was admissible. People v. Hurd (1979) 85 Cal.Rptr. 718, 5 C. A.3d 865.

19.5 Cross-examination

In prosecution for oral copulation by force and sodomy by force, sustaining objection to question asking victim if he was a member of a motorcycle club, based on inference that motorcycle clubs of type to which victim belonged practiced sex perversion, even if error, was not reversible error where defense counsel was not prevented from asking questions directly concerning specific acts of perversion committed by victim. People v. Jones (1970) 88 Cal.Rptr. 871, 10 C.A.3d 237.

20. Weight and sufficiency of evidence—Generally

Evidence in prosecution for forcible rape, sodomy and oral copulation was sufficient to establish the essential elements of resistance and forcible compulsion, in view of showing that followed alleged prior rape defendants misled victim as to their intent, took her to isolated park area, escorted her, one on each arm, to secluded location where they ordered her to perform subject acts and that each of the two men were of considerable size and obvious strength and area was one in which no help was readily available; compliance with orders of defendants reasonably comported with suppression of resistance, considering threats to harm victim. People v. King (1979) 156 Cal.Rptr. 268, 94 C.A.3d 696.

Evidence was sufficient to establish that defendant inmate personally used force against victim, a 19-year-old county jail inmate, and that he used fellow inmate as an instrumentality of duress and menace, as well as agent he would use to commit great bodily injury, if victim did not participate in acts of oral copulation and evidence was sufficient to show that defendant aided and abetted such fellow inmate in menacing victim and in threatening great bodily injury in order to compel participation in acts of oral copulation. People v. Campbell (App.1978) 151 Cal.Rptr. 175.

In prosecution for sodomy, error in allowing defendant to be impeached by evidence of prior sexual incident was not prejudicial where evidence of defendant's coercion was clear and substantial. People v. Holbrook (1974) 117 Cal.Rptr. 804, 43 C.A.3d 636.

Evidence was sufficient, notwithstanding assertion that testimony by one victim that accused had performed ten acts of sexual intercourse within three to four hours was inherently improbable and assertion that victims' identifications of accused were mistaken as matter of law in light of fact that accused had speech impediment and that none of victims testified that assailant stuttered, to sustain convictions of simple kidnapping, sodomy, two counts of kidnapping for purpose of robbery, two counts of robbery, and two counts of sex perversion. People v. Thornton (1974) 114 Cal.Rptr. 467, 523 P.2d 267, 11 C.3d 738, certiorari denied 95 S.Ct. 1118, 420 U.S. 924, 43 L.Ed.2d 393.

Evidence was sufficient to permit trial court to recognize ability of sodomy victim, whose ability to communicate or to distinguish between truth and falsity was not, according to psychiatrist, affected by his mental condition to express himself so as to be understood and to understand his duty to tell the truth, notwithstanding lapse of memory about testifying before the grand jury and weakness of recollection about events before and after the incident involved. People v. Hines (1970) 89 Cal.Rptr. 416, 10 C.A.3d 1035.

20.5 —— Complaint of victim, weight and sufficiency of evidence

That there was two-day delay before purported victim told female officer of act of sodomy affected only weight of testimony as to such statement by victim and not its admissibility, in view of evidence that victim had not mentioned sodomy in her first interview with police because she considered the sodomy as part of the rape and in view of reluctance of a female victim in a sex case to give full details of the offense to a male officer. People v. Brown (1973) 110 Cal.Rptr. 824, 35 C.A.3d 317.

24. Instructions—Generally

Instruction in sodomy prosecution wherein a special finding was sought as to whether defendant had acted in concert with another in committing sodomy on the victim with force and violence, to the effect that term "acting in concert" was synonymous with the term "aiding and abetting" was proper where evidence of the state showed a gang-type forcible sexual assault upon victim. People v. Calimee (1975) 122 Cal.Rptr. 658, 15 C.A.3d 337.

25. —— Failure to give instructions

Where defendant's intent to commit alleged act of sodomy was never in issue and there was no suggestion that act was result of accident or mistake but, rather, trier of fact was presented with testimony by victim relating act and defendant's denial and pursuit of alibi defense, any error in failure to instruct, sua sponte, on necessity of union of general intent with proscribed act was harmless. People v. Gonzalez (1978) 146 Cal.Rptr. 417, 81 C.A.3d 271.

Instruction in prosecution for rape or other sex offenses to the effect that such a charge is easily made and difficult to defend against is no longer to be given mandatory application; on the contrary, such an instruction is inappropriate in any context, and further use of such language is disapproved; overruling decisions to the contrary. People v. Rincon-Pineda (1975) 123 Cal.Rptr. 119, 538 P.2d 247, 14 C.3d 864, 92 A.L.R.3d 815.

In prosecution for rape and related offenses, error in failing to give then required instruction to the effect that such a charge is easily made and difficult to defend against was not prejudicial where there was no substantial probability that jury given the instruction would have been any more aware than the jury which convicted defendant that the key issue in the case was the credibility of the complaining witness. Id.

Fact that alleged victim of sodomy and kidnapping stayed home from school claiming illness on morning defendant came to his home and took victim to defendant's home and that victim failed to escape from defendant's home when defendant was in another room and that victim accepted a dollar from defendant after anal intercourse raised inferences that defendant may have been an accomplice, but failure to instruct on accomplices was not prejudicial in view of jury finding that victim was taken to defendant's home against his will and had been threatened with deadly weapon. People v. Brown (1970) 86 Cal.Rptr. 149, 8 C.A. 3d 519.

27. Misconduct of prosecution

It was not improper for prosecutor, in prosecution for sodomy upon victim by fellow inmates in county jail, to call attention of jury to circumstance that law provided the proper means for bringing victim to justice and that there was no place for per-

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sonal retribution. People v. Blagg (1970) 89 Cal.Rptr. 446, 10 C.A.3d 1035.

29. Included offenses

People v. Blagg (1968) 72 Cal.Rptr. 93, 267 C.A.2d 598 [main volume] appeal after remand 89 Cal.Rptr. 446, 10 C.A.3d 1035.

31. Sentence and punishment

Date of commission of primary California offense is only germane date for purposes of determining whether prior conviction rendered in foreign state meets requirements of § 667.5, and thus defendant's 1964 Ohio sodomy conviction, which was rendered under R.C.Ohio § 2901.44 which did not include consent as element, was not "nonviolent" felony for purposes of § 667.5 where lack of consent was necessary element in California sodomy statute (this section) in force at time of primary offense. People v. Hickey (App.1969) 167 Cal.Rptr. 256.

At some point in time, state prison inmate, sentenced to imprisonment for term of not less than one year following conviction of sodomy, was entitled to have his term fixed, within limits imposed by this section, at number of years proportionate to his individual culpability, measured by circumstances existing at time of offense. In re Williams (1976) 126 Cal.Rptr. 457, 53 C.A.3d 10.

Imposition of death penalty against accused, who was convicted of simple kidnapping, sodomy, two counts of kidnapping for purpose of robbery, two counts of robbery and two counts of sex perversion, would have constituted cruel or unusual punishment. People v. Thornton (1974) 114 Cal. Rptr. 467, 523 P.2d 267, 11 C.3d 738, certiorari denied 95 S.Ct. 1118, 420 U.S. 924, 43 L.Ed.2d 393.

Defendant's convictions for the offenses of incest, oral copulation and sodomy did not constitute a cruel and unusual punishment, and §§ 285, 286a, and this section proscribing the offenses did not constitute an unconstitutional infringement by state on defendant's right of privacy. People v. Hurd (1970) 85 Cal.Rptr. 718, 5 C.A.3d 865.

32. Review

Victim's initial failure to complain of sodomy, and other inconsistencies, bore on determination of victim's credibility and drawing of inferences which were for jury and which would not be disturbed on appeal of conviction of sodomy by inmates who had allegedly assaulted victim in county jail. People v. Blagg (1970) 89 Cal.Rptr. 446, 10 C.A.3d 1035.

Inconsistencies and discrepancies in testimony of sodomy and kidnapping victim with respect to whether victim could have known defendant at certain time and as to weapon used to threaten victim did not make victim's testimony inherently improbable or require its rejection by reviewing court. People v. Brown (1970) 86 Cal.Rptr. 149, 6 C.A.3d 619.

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§ 288a. Oral copulation; punishment

(a) Oral copulation is the act of copulating the mouth of one person with the sexual organ of another person.

(b)(1) Except as provided in Section 288, any person who participates in an act of oral copulation with another person who is under 18 years of age shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year.

(2) Except as provided in Section 288, any person over the age of 21 years who participates in an act of oral copulation with another person who is under 16 years of age shall be guilty of a felony.

(c) Any person who participates in an act of oral copulation with another person who is under 14 years of age and more than 10 years younger than he, or * * * when the act is accomplished against the victim's will by means of force, violence, duress, menace, or * * * fear of immediate and unlawful bodily * * * injury on the victim or another person shall be punished by imprisonment in the state prison for three, six or eight years.

(d) Any person who, while voluntarily acting in concert with another person, either personally or by aiding and abetting such other person, commits an act of oral copulation * * * when the act is accomplished against the victim's will * * * by means of force or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for five, seven, or nine years.

(e) Any person who participates in an act of oral copulation while confined in any state prison, as defined in Section 4504 or in any local detention facility as defined in Section 6031.4, shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year.

(f) Any person who commits an act of oral copulation, and the victim is at the time unconscious of the nature of the act and this is known to the person committing the act, shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year.

(Amended by Stats.1975, c. 71, p. 134, § 10; Stats.1975, c. 877, p. 1958, § 2; Stats.1976, c. 1139, p. 5111, § 178, operative July 1, 1977; Stats.1977, c. 490, p. 1614, § 2; Stats.1978, c. 579, p. 1984, § 18; Stats.1979, c. 944, p. —, § 7; Stats.1980, c. 915, p. —, § 2.)

Enhancement of prison term of offender under this section who was previously convicted of such offense, see § 667.5.

Failure to register as sex offender after conviction under this section upon subsequent release, type of offense and punishment, see § 290.

Underline indicates changes or additions by amendment

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Firearm or deadly weapon, use or possession in commission of offense under this section, enhancement of sentence, see § 12022.3.

Infliction of great bodily injury in commission of offense under this section, additional punishment, see § 12022.8.

Minors committing offense under this section, presumption of unfitness to be dealt with under juvenile system, see Welfare and Institutions Code § 707.

Plea specifying punishment unavailable in case of violations of this section by force, violence, duress, menace, or threat of great bodily harm, see § 1192.5.

Probation or suspension of sentence prohibited for certain offenses under this section, see § 1203.065.

Sentence and punishment for violating provision of this section, number of enhancements not to be limited, see § 1170.1.

Youth authority, commitment to authority of 18-year-old sex offender with prior sex offense prohibited, see Welfare and Institutions Code § 1732.

Prospective application of Stats.1978, c. 579, to crimes committed on or after January 1, 1979, see note under § 182.

1975 Amendments. Rewrote section.

1976 Amendment. Deleted "for a period of not more than five years" following "in the state prison" in subd. (b)(1); in subd. (c) substituted "two, three or four years" for "a period not less than three years;" in subd. (d) substituted "three, four or five years" for "a period of five years to life;" and in subd. (e) following "state prison" deleted "for a period of not more than five years."

1977 Amendment. Added subd. (f).

1978 Amendment. Substituted "three, six, or eight" for "two, three or four" years in subd. (c), and "five, seven, or nine" for "three, four or five" years in subd. (d).

1979 Amendment. Added the exception in subds. (b)(1) and (b)(2).

1980 Amendment. Substituted "or when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person" for "or who has compelled the participation of another person in an act of oral copulation by force, violence, duress, menace, or threat of great bodily harm" in subd. (c); and substituted "when the act is accomplished against the victim's will by means of force or fear of immediate and unlawful bodily injury on the victim or another person" for "by force or violence and against the will of the victim" in subd. (d).

Derivation: Former section 288b, added by Stats.1967, c. 1551, p. 3722, § 3.

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Evidence of other sex offenses offered as part of the prosecution's case-in-chief. (1977) 25 U.C.L.A.Law Rev. 277.

Extending the right to sexual privacy. (1975) 2 West St.L.R. 281.

Lesbian mother. (1973) 4 Golden Gate L.Rev. 1.

Prosecution of principals in "pornographic" film productions for commission of, or conspiracy to commit, proscribed sex acts. 21 U.C.L.A.Law Rev. 213.

Same sex marriage. (1973) 6 U.C.D.Law Rev. 275.

Sexual freedom for consenting adults. (1971) 2 Pacific L.J. 206.

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1. Validity

Subd. (c) of this section prohibiting prisoners from engaging in consensual oral copulation is rationally related to governmental purpose of maintenance of prison discipline and order does not violate equal protection clauses of Federal and State Constitutions (U.S.C.A.Const. Amend. 14; Const. Art. 1, § 7). People v. Santibanez (1979) 154 Cal.Rptr. 74, 91 C.A. 3d 287.

Inasmuch as the uncontroverted evidence indicated that offense of oral sex perversion, if committed, was accomplished by force and violence, defendant had no standing to attack constitutionality of this section as applied to consenting adults. People v. Reeder (1976) 135 Cal.Rptr. 421, 65 C.A.3d 235.

This section which prohibits oral sodomy was not violative of the nonestablishment clause of the First Amendment to the federal constitution (U.S.C.A.Const. Amend. 1) or the nonestablishment clause of the state constitution (Const. Art. 1, § 4) because the crimes historically were under the exclusive jurisdiction of the ecclesiastical courts and were regarded as sins in the system of morals of the Judaeo-Christian religions. People v. Baldwin (1974) 112 Cal.Rptr. 290, 37 C.A.3d 385.

This section prohibiting oral copulation, not involving suspect classifications, was to be tested by traditional equal protection "rationality" standard rather than by "strict scrutiny" standard. People v. Parker (1973) 109 Cal.Rptr. 251, 33 C.A.3d 812.

This section prohibiting oral copulation did not deny equal protection or due process where alleged violation of statute occurred with respect to filming of movie. Id.

This section proscribing the act of copulating the mouth of one person with the sex organ of another is not unconstitutional when applied to consenting adults. People v. Drolet (1973) 105 Cal.Rptr. 824, 30 C.A.3d 207.

2. In general

Mere fact of one's having homosexual proclivities does not per se deprive him of legal entitlements and constitutional immunities; it is only the act or acts committed in the manifestations of an individual's homosexual orientation and proclivities that are forbidden under the law. Lipp v. Procunier (D.C.1975) 395 F.Supp. 871, supplemented 402 F.Supp. 523.

Defendant, who was convicted of participating in an act of oral copulation while confined in 12-man cell of county jail, did not have a cognizable right to sexual privacy. People v. Santibanez (1979) 154 Cal. Rptr. 74, 91 C.A.3d 287.

Where defendants were both male, were not husband and wife nor partners in any

Asterisks * * * indicate deletions by amendment

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Note 2

sort of stable union and the act for which defendants were prosecuted was not performed in private, defendants did not have standing to assert the unconstitutionality of the oral sodomy statute on ground it violated a right of privacy and a right of marital privacy. People v. Baldwin (1974) 112 Cal.Rptr. 290, 37 C.A.3d 385.

Act of oral copulation committed during stage performance was not a method of expression and a form of speech protected by First Amendment (U.S.C.A.Const. Amend. 1). People v. Drolet (1973) 105 Cal.Rptr. 824, 30 C.A.3d 207.

3. Construction and application

Gov.C. § 9608 was inapplicable when this section under which defendant was convicted was, in effect, repealed before judgment became final and accordingly, defendant's convictions of violations of oral copulation would be reversed. People v. Rossi (1976) 134 Cal.Rptr. 64, 555 P.2d 1313, 18 C. 3d 295.

3.5 Right to counsel

Evidence sustained determination that accused who entered pleas of guilty to charges of oral copulation had competent assistance of experienced, well-prepared defense counsel. People v. Kraus (1975) 121 Cal.Rptr. 11, 47 C.A.3d 568.

The practice of oral copulation in public place is not a fundamental right within the protection of the Ninth Amendment to the Federal Constitution (U.S.C.A.Const. Amend. 9). People v. Baldwin (1974) 112 Cal.Rptr. 290, 37 C.A.3d 385.

The legislature did not act unreasonably by declaring oral copulation in a public place to be a felony while designating the commission of lewd acts in a public place a misdemeanor. Id.

Where defendant, although represented by counsel, moved to represent himself at time of plea and court then denied motion but advised defendant that he could renew motion at trial, trial judge had no duty at subsequent hearing, at which defendant waived his constitutional rights and cause was submitted on all issues on preliminary hearing transcript, to advise defendant of his right to represent himself and defendant's failure to make known his desire to represent himself, mention subject or to renew motion to represent himself constituted waiver of his right to represent himself. People v. Enciso (1972) 101 Cal.Rptr. 530, 25 C.A.3d 49.

Public solicitation to engage in consensual sexual conduct from which criminal sanctions have been removed is still subject to prosecution under subd. (a) of § 647. Op.Leg.Counsel, 1975 A.3. 1513.

3.7 Abatement of pending prosecutions

Although legislature retains constitutional authority to preserve criminal sanctions for acts committed prior to repeal, there was nothing to indicate that legislature, in enacting amendment to this section so as to remove criminal sanction for oral copulation between consenting adults, intended to depart from common-law rule relating to abatement of criminal convictions and to retain prior criminal sanctions with respect to defendants whose convictions had not become final at time of repeal. People v. Rossi (1976) 134 Cal.Rptr. 64, 555 P.2d 1313, 18 C.3d 295.

Educ.C. § 12912 amendment, specifying that definition of "sex offense" included, inter alia, offense of oral copulation committed prior to effective date of amendment which in effect repealed offense between consenting adults, did not purport to establish whether or not pending criminal prosecutions would abate but merely evidenced legislative determination that individuals whose convictions under § 286 and this section had become final and who may have been dismissed from employment as teacher or school employee on that basis years ago were not entitled to reinstatement even though former criminal sanctions were now repealed; accordingly, amendment afforded no basis for upholding defendant's convictions of violations of oral copulation where this section was, in effect, repealed before judgment became final. Id.

4. Elements of offense

Offense of forcible oral copulation is complete when mouth is forcibly placed upon genital organ of another. People v. Minor (1980) 163 Cal.Rptr. 501, 104 C.A. 3d 194.

In view of amendment of this section so as to proscribe oral copulation only when it is effected by force, committed while in prison or committed with minor, oral copulation could not be punished where judgments were not final prior to effective date of amendment, even though numerous continuances were granted in course of proceedings. People v. Apelby (1978) 141 Cal. Rptr. 78, 78 C.A.3d 73.

Violation of this section is not a crime requiring a specific intent; it is not essential to conviction that proof show accused to have entertained any intent to violate the law and it is sufficient that he intentionally committed the forbidden act. People v. Brocklehurst (1971) 92 Cal.Rptr. 349, 11 C.A.3d 473.

4.5 Intent

No more than a general criminal intent is required with regard to offenses of sexual perversion, simple kidnapping and sodomy. People v. Thornton (1974) 114 Cal.Rptr. 467, 523 P.2d 267, 11 C.3d 738, certiorari denied 95 S.Ct. 1118, 420 U.S. 924, 43 L.Ed.2d 393.

5. Accomplices

Consolidation of counts charging defendant with kidnapping, rape, and oral copulation of one victim and kidnapping and rape of another victim was proper. People v. Shells (1971) 91 Cal.Rptr. 275, 481 P.2d 1227, 4 C.3d 626.

Where daughter was taken into custody by juvenile authorities and policeman investigating case contacted the defendant who then fled state, flight constituted an implied admission by conduct and afforded an inference of consciousness of guilt constituting sufficient corroboration under § 1111 with respect to crimes of oral copulation and sodomy to which he claimed his daughter was an accomplice. People v. Hurd (1970) 85 Cal.Rptr. 718, 5 C.A.3d 865.

5.4 Aiders and abettors

Fact that defendant was not in room at very moment act of oral copulation took place did not dispel conclusion that he acted in concert with his companion to accomplish act nor did it dissipate initial force and threats he used to allow his companion to commit act. People v. Barnett (App. 1976) 127 Cal.Rptr. 88.

Record showing that defendant was employer of the actors who committed the act of oral copulation on stage as well as the producer of show but that he claimed he merely advise performers to simulate act of copulation was not sufficient to convict him of the crime of aiding and abetting or of conspiracy to commit act of oral copulation. People v. Drolet (1973) 105 Cal.Rptr. 824, 30 C.A.3d 207.

5.5 Armed offenders

Where only description of knife possessed by defendant charged with kidnapping for purpose of robbery, perversion, and rape by threat of bodily harm was testimony by victim that defendant possessed big knife whose length she was not asked to estimate and knife was not admitted in evidence, evidence was insufficient to sustain finding that defendant was armed at time of offenses. People v. Smith (1971) 39 Cal.Rptr. 192, 32 C.A.3d 197.

7. Mentally disordered sex offender

Where, after defendant, as part of a plea bargain, pleaded guilty to one count of oral

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copulation in exchange for dismissal of 11 other counts against him, and after defendant was committed to state hospital as mentally disordered sex offender, legislature amended provision of this section so that oral copulation was no longer punishable, defendant could not be sentenced for such crime when it was later determined that he was no longer a danger to the health and safety of others and criminal proceedings were reinstated. People v. Collins (1978) 145 Cal.Rptr. 686, 577 P.2d 1026, 21 C.3d 208.

9.5 Searches and seizures

In view of officer's having actually observed still photos on outsides of numerous packages of films in adult book and movie store and his noting that photos depicted sexual intercourse, oral copulation, sodomy and masturbation, and his noting that photographs in three-ring binder, which store clerk leafed through, and which presumably depicted scenes from listed films, also depicted oral copulation and sexual intercourse, both actual and simulated, and in view of clerk's representations that the films were all "hard core," totality of officer's observations with clerk's representations provided probable cause to believe that films were obscene, and particular film, though not mentioned specifically by name in search warrant affidavit, was properly seized pursuant to warrant. People v. Apelby (1978) 144 Cal.Rptr. 78, 78 C.A.3d 73.

Where conduct of defendants who allegedly were observed copulating with the mouth in violation of statute could have been observed by officers if they had been in public portion of public restroom, officers' observations did not constitute an unreasonable search even though they took place from a vantage point located in an adjacent room not open to the general public. People v. Crafts (1970) 91 Cal.Rptr. 563, 13 C.A.3d 457.

11. Indictment and information

Where kidnapping, rape and assault with a deadly weapon on mother occurred in Los Angeles and forced oral copulation by daughter occurred in San Bernardino County and, although offenses occurred in defendant's automobile during the same night, they were committed with different objectives, and there was only 11-day delay between arrest, filing of complaints in both counties and entering of guilty plea in San Bernardino County to charge of sex perversion on daughter, § 654 requiring compulsory joinder in single accusatory pleading of two or more offenses based on same act or omission did not bar subsequent prosecution in Los Angeles for offenses committed against mother. People v. Ward (1973) 105 Cal.Rptr. 67, 30 C.A.3d 130.

Refusal, in prosecution for rape and oral copulation, in which alibi defense was raised, of trial judge, who had been informed by defendant that defense of consent would not be presented, to permit defendant to extensively question victim as to her prior chastity was not abuse of discretion. People v. Byers (1970) 88 Cal.Rptr. 856, 10 C.A.3d 410.

Alleged circumstances that petitioner's home was used by him to commit crimes charged in four counts and that, as to each such count, male juvenile was the victim, whether specifically alleged by the indictment or shown by testimony before the grand jury, constituted "common elements of substantial importance," justifying joinder of four counts alleging, each as to different victim on different date, attempted oral copulation and oral copulation, both felonies, and contributing to delinquency of minor by allowing him to consume alcoholic beverages and contributing to delinquency of minor in touching, rubbing and fondling minor's private parts, both misdemeanors. Aydelott v. Superior Court In and For San Joaquin County (1970) 86 Cal.Rptr. 713, 7 C.A.3d 718.

12.5 Former jeopardy

Where petitioners were charged by complaint with rape, oral copulation and sodomy but following preliminary hearing magistrate found that complainant had consented to acts of sexual intercourse and that acts of oral copulation and sodomy had not taken place but ordered petitioners held to answer for offense of statutory rape, defendants could not thereafter be prosecuted on information filed by district attorney charging them with rape, oral copulation and sodomy but not charging statutory rape. Jones v. Superior Court of San Bernardino County (1971) 91 Cal.Rptr. 289, 483 P.2d 1241, 4 C.3d 660.

12.6 Severance of counts

Combination of distinctive and undistinctive common marks was sufficient to give rise to reasonable inference that two sets of forcible rape and forcible oral copulation had been committed by the same person; thus, although trial court's denial of motion for severance was based on erroneous belief that court had no authority to grant the motion, defendant was not prejudiced. People v. Jackson (1980) 162 Cal.Rptr. 574, 102 C.A.3d 620.

13. Defenses, in general

Where two psychiatrists who examined defendant felt he was mentally competent to stand trial at time of interview, on a number of occasions, after lengthy explanations with judge, defendant stated he understood proceedings, and defendant's attorney indicated that he advised defendant that trying to deny charges charging violations of this section and §§ 261 and 288 seemed like something that practically might alienate a jury and that they were so gross that defendant's best chance was to try and convince jury that he was less than sane within legal meaning of law, trial court did not abuse its discretion in determining that there was no substantial evidence of doubt that defendant was competent to stand trial. People v. Stewart (1979) 153 Cal.Rptr. 242, 89 C.A.3d 992.

Victim, who participated in defendant's violation of this section relating to oral copulation solely because of fear of great bodily harm or death, was not an accomplice to commission of that crime. People v. Tribble (1971) 94 Cal.Rptr. 613, 484 P.2d 589, 4 C.3d 826.

15. Trial in general

People v. Hagg (1968) 73 Cal.Rptr. 33, 267 C.A.2d 598 [main volume] appeal after remand 89 Cal.Rptr. 146, 10 C.A.3d 1035.

In prosecution for forcible rape and forcible oral copulation, failure of investigative officials to preserve semen specimens taken from victim at hospital after rape did not justify dismissal, even though there was no showing that reasonable measures had been taken to preserve the evidence, where no test results were offered in evidence and there was no indication that prosecuting authorities had been guilty of bad faith. People v. Jackson (1980) 162 Cal.Rptr. 574, 102 C.A.3d 620.

15.5 Consolidation

In prosecution for kidnapping one individual and forcing same individual to commit act of oral copulation, for kidnapping second individual and raping such second individual and with being armed with deadly weapon and for raping third individual and for assaulting such third individual with intent to commit rape, crimes charged were either connected in their commission or were of same class of crimes or offenses and trial court therefore had discretion to deny severance, and no abuse of discretion was shown. People v. Moran (1973) 109 Cal.Rptr. 287, 33 C.A.3d 724.

Where defendant was charged with the robbery of a series of female storekeepers

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at knife point, and with murder in connection with one of the robberies and oral copulation in connection with two of the others, information charging the robbery murder was properly consolidated with information charging five other robberies and two counts of oral copulation, since the robberies were all of the same class within meaning of § 651 and the other offenses were connected together in their commission with the robberies charged, despite contention that defendant was thereby prejudiced in defending the robbery and oral copulation charges. People v. Conrad (1973) 107 Cal.Rptr. 421, 31 C.A.3d 308.

Where codefendants made no extrajudicial statements implicating each other in charged offenses of oral copulation by force and sodomy by force, each defendant was represented by separate counsel, there was no conflict as to theory of trial and none of the defendants sought to waive jury, defendants were not entitled to separate trials at outset of trial. People v. Jones (1970) 88 Cal.Rptr. 871, 10 C.A.3d 237.

16. Examination of witnesses

Where witness had given his version of interview with prosecuting attorney, any error in allowing prosecutor to testify, without objection, for purpose of giving his version of his interview with such possibly hostile witness was harmless error under circumstances including fact that prosecutor's testimony went to least serious of various offenses for which defendant was convicted, i. e., bore only upon offense of unlawful intercourse by defendant convicted also of forcible rape and oral copulation. People v. Guerrero (1975) 120 Cal.Rptr. 732, 47 C.A.3d 441.

16.5 Testimony of victim

Testimony of victim in prosecution for burglary in the first degree, rape, kidnapping and attempted oral copulation, was not inherently improbable where there was neither a physical impossibility nor an apparent falsity without resorting to inferences or deductions. People v. Stender (1975) 121 Cal.Rptr. 331, 47 C.A.3d 413.

17. Comments and conduct—Counsel

Defendant who was convicted on charges of kidnapping and robbery but acquitted on charges of rape and oral sodomy was not denied effective assistance of counsel either by virtue of counsel's failure to object to alleged illegality of search, which was justified, or by failure to make every available objection. People v. Wiley (1976) 129 Cal.Rptr. 13, 57 C.A.3d 149.

Failure of counsel to object to admission of evidence concerning sex crimes other than those charged in prosecution under lewdness and perversion statutes did not amount to ineffective representation where failure to object may have been sound trial strategy. People v. Edwards (1970) 90 Cal. Rptr. 475, 12 C.A.3d 87.

18. —— Prosecution, comments and conduct

Defendant charged with kidnapping, rape and oral copulation was not denied fair trial by reason of alleged inference by prosecution that defendant might be the Hillside Strangler inasmuch as it was apparent that defendant had been dismissed as suspect in those stranglings and acts for which he was charged were not similar to those much-publicized crimes. People v. Wills-Watkins (1979) 160 Cal.Rptr. 289, 99 C.A.3d 451.

In prosecution of defendant for aiding and abetting in oral copulation involving a minor, district attorney should not have been permitted to argue that hearsay testimony concerning statement by codefendant proved defendant's intent; no reversible error occurred, however, in view of other admitted evidence and lack of substantial prejudice to defendant. People v. Yarber (1979) 153 Cal.Rptr. 875, 90 C.A.3d 895.

Prosecutor's comment that it is common knowledge that child molesters go free was not prejudicial, where it was made in response to defense argument that innocent people were convicted and sent to prisons on child molestation crimes because several children made up allegations and because it was hard for jury to believe that young children would have made up such stories. People v. Hardower (1975) 145 Cal.Rptr. 271, 75 C.A.3d 818.

Black prosecutor's unsupported assertion, in prosecution, in which there was sharp conflict between testimony and close question as to whether knife in question was "dirk or dagger," for forcible rape, false imprisonment, oral copulation and possession of concealed dirk or dagger, that black defendant and his counsel fabricated "pick up" story and prosecutor's statement of personal belief in defendant's guilt built on racial foundation, were misconduct constituting reversible error. People v. Bain (1971) 97 Cal.Rptr. 684, 189 P.2d 564, 5 C.3d 839.

19. —— Judges, comments and conduct

Error in refusing jury's request for rereading of testimony of key witnesses in prosecution for oral copulation and attempted forcible rape, which request was made on ground that some of the testimony was so faint that jurors had been unable to hear it correctly, was prejudicial. People v. Butler (1975) 120 Cal.Rptr. 647, 47 C.A.3d 273.

22.5 Great bodily injury

Oral copulation of victim by defendant and his forcing her to kiss his penis did not constitute bodily injury to victim so substantial or significant as to constitute "great bodily injury" for purposes of enhancement of punishment. People v. Sargent (1978) 150 Cal.Rptr. 113, 86 C.A.3d 148.

23. Admissibility of evidence, In general

Although proffered character evidence in prosecution for assault by means of force likely to produce great bodily injury and assault with intent to commit forcible oral copulation was not inadmissible to show that victim responded positively to defendant's sexual advances, any error in rejecting proffered evidence was not prejudicial where evidence only showed that victim liked men, frequently kissed and hugged them and accepted rides home from them. People v. Cavino (1980) 161 Cal.Rptr. 155, 100 C.A.3d 660.

25.4 Hearsay, admissibility of evidence

Evidence of complaint by nonconsenting victim of sex offense is admissible as exception to hearsay rule, but must be confined to victim's statement of nature of offense, without details, and identity of asserted offender. People v. Crume (1976) 132 Cal.Rptr. 577, 61 C.A.3d 803.

26. —— Pictures and photographs, admissibility of evidence

Photographs which were admitted in prosecution for lewd and lascivious conduct and for oral copulation with a child and which were of other boys in the nude were admissible as constituting part of the offense with which defendant was charged, as pertaining to the occasion in issue in the current action, and as tending to discredit defendant's extrajudicial statement that he took photographs of victim only because victim asked him to so that he could show them to his girlfriend, refute any inference that it was victim who initiated sexual conduct, and challenge implication that defendant was just a "big brother" to victim, "a family friend" and a "father" figure. People v. Reeves (1980) 164 Cal.Rptr. 426, 108 C.A.3d 141.

29. —— Similar assaults, admissibility of evidence

Although there was difference in defendant's degree of success with two victims,

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there was sufficient similarity between two incidents to make testimony concerning first incident admissible in prosecution for kidnapping, rape and oral copulation based upon second incident. People v. Wills-Watkins (1979) 160 Cal.Rptr. 249, 99 C.A.3d 451.

Trial court in prosecution for forced oral copulation did not abuse discretion in admitting testimony of a similar offense allegedly committed by defendant on another woman two years previously although defendant was never prosecuted for such offense which had several distinctive marks in common with that charged in present prosecution. People v. Goodson (1978) 145 Cal.Rptr. 489, 80 C.A.3d 220.

Evidence of uncharged crime wherein victim was transported by car to remote place prior to sexual assault, victim was totally disrobed and attacker threatened to kill victim if she resisted, used physical brutality, represented that attacker had killed other victims, used knife to threaten, resorted to choking and attempted to commit an act of sexual perversion was admissible on certain charges, in that probative value of such evidence on issue of identity of perpetrator of charged offenses, in which many of same characteristics were present, outweighed prejudicial effect inherent in such evidence. People v. Thornton (1974) 114 Cal.Rptr. 467, 523 P.2d 267, 11 C.3d 738, certiorari denied 95 S.Ct. 1118, 420 U.S. 924, 43 L.Ed.2d 393.

30. —— Other offenses, admissibility of evidence

Defendant's theory on trial for rape and other offenses, that victim had consented to sexual acts, was tantamount to denial that he had intended to achieve oral copulation and sexual intercourse by force or intimidation, and evidence of prior offenses was thus admissible to establish defendant's intent in present offense by corroborating victim's testimony that she had not consented to the acts, so long as prior offenses were not remote and were similar to offense charged, and court's limiting instruction, that evidence of prior offense was admissible to prove intent, was appropriate to intent theory of admissibility and to corroboration theory as well. People v. Jackson (App.1980) 167 Cal.Rptr. 915.

In prosecution of defendant charged with sex offenses against a child under 14, testimony of three other young girls relating to similar acts of molestation committed on them and testimony of defendant's wife as to conduct with girls was properly admitted. People v. Van de Water (App.1980) 166 Cal.Rptr. 321.

Evidence of prior sex offense involving victim other than prosecuting witness was admissible to corroborate prosecutrix' testimony, where the prior offense was not remote in time, it was similar to charged offense and was committed upon persons similar to the prosecuting witness. People v. Jackson (1980) 162 Cal.Rptr. 574, 102 C.A.3d 620.

In prosecution for forcible rape, forcible oral copulation and burglary with intent to commit rape, trial court did not abuse its discretion in permitting prosecution to introduce evidence that defendant had previously been convicted of felony of burglary with intent to commit theft. People v. Coleman (1979) 152 Cal.Rptr. 407, 89 C.A.3d 312.

In prosecution for violating provision of this section which makes it a crime for any person to participate in an act of oral copulation while confined in any local detention facility, no error occurred in admitting evidence of each of defendant inmate's prior convictions, even though defendant contended that proof of one was sufficient to attack his credibility, where each prior conviction had a strong probative value for impeachment purposes and each was highly relevant on issue of honesty and truthfulness. People v. Campbell (1978) 151 Cal.Rptr. 175, 87 C.A.3d 478.

In prosecution for molesting young girls, another girl's testimony that she had observed defendant and his daughter perform act similar to those charged was of probative value and trial court did not abuse its discretion in holding that the probative value outweighed possible prejudicial effect of testimony and in admitting the testimony to show general scheme or design, inasmuch as evidence warranted inference that, if defendant committed such act, he committed the acts charged. People v. Haslouer (1978) 145 Cal.Rptr. 237, 79 C.A.3d 818.

In prosecution for rape accomplished by threats of great and immediate bodily harm and for oral copulation, trial court did not err in admitting evidence of prior sexual attack which was offered to prove identity of perpetrator of charged crime, in view of similarity of the two incidents and in view of fact that evidence of prior incident raised reasonable and strong inference that defendant, perpetrator of prior crime, was also perpetrator of offenses for which defendant was on trial. People v. Whittington (1977) 141 Cal.Rptr. 712, 71 C.A.3d 506.

Admission of evidence of prior offenses showing defendant's distinct modus operandi, in which defendant in each instance went to residence of victim, who had advertised item for sale by posting ad in paper, under pretense of examining item for sale and told victim that he had lost his watch stem, subdued victim by grabbing her from behind, threatened her with a knife and bound her wrists and ankles with ligature which he brought with him, was not abuse of discretion and no miscarriage of justice occurred, in prosecution for burglary of first degree, robbery of first degree, forcible oral copulation, attempted murder and murder of first degree; moreover, it was relevant and proper to show that defendant did not simply use that technique on one prior isolated occasion but repeatedly used that technique. People v. Wein (1977) 137 Cal.Rptr. 811, 69 C.A.3d 79.

In cases involving sex crimes, evidence of other, not too remote, sex offenses with prosecuting witness is admissible to show lewd disposition or intent of defendant towards victim, but where such cases are reduced to contest of credibility and such evidence is limited to uncorroborated testimony of prosecuting witness, trier of fact is not aided by evidence of other offenses. People v. Crume (1976) 132 Cal.Rptr. 577, 61 C.A.3d 803.

Purpose of rule that, in sex crime cases reduced to contest of credibility between victim and defendant as to commission of acts charged, trier of fact is not aided by evidence of other offenses limited to uncorroborated testimony of prosecuting witness is directed to evidence of uncharged offenses introduced to fortify credibility of prosecuting witness, and rule is not aimed at evidence relevant to credibility of defendant. Id.

Evidence of uncharged crime wherein attacker used surprise to gain entry into victim's car, victim was transported to place remote, and was totally disrobed, victim's purse was gone through prior to sexual assault, attacker had odor of gasoline on him, used extreme brutality, expressed desire to cause pain and inserted matter into victim's vagina, was admissible on certain charges, in that probative value of such evidence on identity of perpetrator of charged offenses, in which most of same characteristics were present, outweighed prejudicial effect inherent in such evidence. People v. Thornton (1974) 114 Cal.Rptr. 467, 523 P.2d 267, 11 C.3d 738, certiorari denied 95 S.Ct. 1118, 420 U.S. 924, 43 L.Ed.2d 393.

Probative value of defendant's prior convictions of assault with intent to rape and forcible rape which occurred only about a

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year and a half prior to prosecution for assault with intent to rape, assault by means likely to produce great bodily harm, oral copulation and attempted forcible rape was not substantially outweighed by the probability that their admission would create substantial danger of undue prejudice; thus, admission of prior convictions was not an abuse of discretion. People v. Delgado (1973) 108 Cal.Rptr. 359, 32 C.A.3d 242.

Defect, if any, in admissibility of evidence of sexual misconduct of defendant with person other than rape victim was waived by failure to object and could not be raised on appeal, where defendant had ample opportunity to object before any intimation of prejudicial evidence reached jury. People v. Chain (1971) 99 Cal.Rptr. 472, 22 C.A.3d 493.

Admission in prosecution under lewdness and perversion statutes of evidence concerning sex crimes other than those charged was not error in absence of objection at trial. People v. Edwards (1970) 90 Cal.Rptr. 478, 12 C.A.3d 87.

Where evidence of other sex offenses was similar in nature and committed on same victim at a point close in time to the charged sex offenses and the evidence of commission of other offenses was not based solely on the uncorroborated testimony of victim but was substantially corroborated, evidence of other offenses was admissible. People v. Hurd (1970) 85 Cal.Rptr. 718, 5 C.A.3d 865.

34.9 Judicial notice

In prosecution for rape accomplished by threats of great and immediate bodily harm and for oral copulation, trial court properly ruled that it could not take judicial notice of fact that persons of one race often have difficulty identifying and distinguishing those of another and that matter was therefore properly within purview of an expert. People v. Whittington (1977) 141 Cal.Rptr. 742, 74 C.A.3d 806.

35. Weight and sufficiency of evidence, in general

Evidence was sufficient to sustain convictions for rape and oral copulation. People v. Gayther (App.1980) 167 Cal.Rptr. 760.

Evidence that defendant demanded that victim orally copulate him, and when she refused, assaulted her, telling her that he would kill her if she did not comply was sufficient to sustain conviction for assault with intent to commit felony, to wit: forcible oral copulation. People v. Covino (1980) 161 Cal.Rptr. 155, 100 C.A.3d 660.

Evidence in prosecution for forcible rape, sodomy and oral copulation was sufficient to establish the essential elements of resistance and forcible compulsion, in view of showing that followed alleged prior rape defendants misled victim as to their intent, took her to isolated park area, escorted her, one on each arm, to secluded location where they ordered her to perform subject acts and that each of the two men were of considerable size and obvious strength and area was one in which no help was readily available; compliance with orders of defendants reasonably comported with suppression of resistance, considering threats to harm victim. People v. King (1979) 156 Cal.Rptr. 268, 94 C.A.3d 696.

Evidence supported defendant's conviction of aiding and abetting codefendant in engaging in oral copulation with minor by encouraging minor to engage in such act. People v. Yarber (1979) 153 Cal.Rptr. 875, 90 C.A.3d 895.

In prosecution for forcible rape and forcible oral copulation, jury as trier of fact was not required to believe defendant's version of a consenting victim to acts of sexual intercourse and oral copulation. People v. Coleman (1979) 152 Cal.Rptr. 407, 89 C.A.3d 312.

Evidence was sufficient to sustain defendant's conviction of offenses of forcible rape and forcible oral copulation. Id.

Substantial evidence supported defendant's conviction of rape by threats of great and immediate bodily harm. People v. Goltman (1976) 124 Cal.Rptr. 834, 64 C.A.3d 775.

Victims' testimony that defendant kissed them in the vaginal area with his tongue was sufficient to support finding that defendant was guilty of oral copulation. People v. Wilson (1971) 97 Cal.Rptr. 774, 20 C.A.3d 597.

Prosecutrix' allegedly unchaste character and fact that she was hitchhiking during early morning hours when she was forced into defendants' automobile did not affect her credibility so as to render her testimony legally insufficient to sustain convictions for kidnapping, forcible oral copulation and forcible rape. People v. Mays (1971) 95 Cal.Rptr. 190, 17 C.A.3d 641.

37. —— Improbable testimony, weight and sufficiency

In prosecution for violation of provision of this section which makes it a crime for any person to participate in an act of oral copulation while confined in any local detention facility, evidence presented through testimony of victim, a 15-year-old county jail inmate, was not inherently improbable and thus evidence was not insufficient as a matter of law, even though there were conflicts in victim's testimony and a number of witnesses contradicted him, since even if jury believed, after having considered testimony of defense witnesses, that many portions of victim's testimony were deliberate falsehoods, it was free to conclude that those portions of his testimony concerning defendant inmate were true. People v. Campbell (1978) 151 Cal.Rptr. 175, 87 C.A.3d 678.

38. —— Testimony of accomplice, weight and sufficiency

If offense of oral copulation was committed by defendant operator of massage parlor and police officer, officer was an accomplice and his uncorroborated testimony was not sufficient to convict defendant. People v. Brocklehurst (1971) 92 Cal.Rptr. 340, 14 C.A.3d 473.

39. —— Identity of defendant, weight and sufficiency

Evidence was sufficient, notwithstanding assertion that testimony by one victim that accused had performed ten acts of sexual intercourse within three to four hours was inherently improbable and assertion that victims' identifications of accused were mistaken as matter of law in light of fact that accused had speech impediment and that none of victims testified that assailant stuttered, to sustain convictions of simple kidnapping, sodomy, two counts of kidnaping for purpose of robbery, two counts of robbery, and two counts of sex perversion. People v. Thornton (1974) 114 Cal.Rptr. 467, 523 P.2d 267, 11 C.3d 738, certiorari denied 95 S.Ct. 1118, 420 U.S. 924, 43 L.Ed.2d 393.

39.5 —— Sanity of defendant, weight and sufficiency

Substantial evidence supported jury's finding that defendant was sane at time he raped and had oral copulation with victim. People v. McCarthy (App.1980) 167 Cal.Rptr. 772.

42. —— Pictures and photographs, weight and sufficiency

Fact that photograph of person, who was asserted to resemble accused in certain respects and to have been a habitué of garage or service station near car to which a victim was taken upon her abduction was lost by clerk of court after its admission and thus was not available to jury for comparison purposes did not deprive accused of

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fair trial where another photograph of such person remained in evidence for consideration of jury and there was no contention that lost photograph was other than cumulative of other photograph. People v. Thornton (1974) 114 Cal.Rptr. 467, 523 P.2d 267, 11 C.3d 738, certiorari denied 95 S.Ct. 1118, 420 U.S. 921, 43 L.Ed.2d 393.

47. —— Jury

In prosecution for oral copulation allegedly performed on two girls whether, as to act performed on each of the girls, the other girl was an accomplice or a nonparticipating observer for purposes of corroboration was fact question. People v. Wilson (1971) 97 Cal.Rptr. 771, 20 C.A.3d 507.

48. Instructions, in general

In prosecution for rape by threat and forcible oral copulation, jury should have been provided with instructions more particularized than those contained in CALJIC. People v. St. Andrew (1980) 161 Cal.Rptr. 631, 101 C.A.3d 150.

Instruction referring to offenses in § 288 proscribing lewd or lascivious acts on child under age of 14 as oral sex perversion was not prejudicial to defendant charged with oral copulation by force, since crime of oral copulation is commonly recognized and referred to as a type of sex perversion. People v. Stuller (1976) 89 Cal.Rptr. 158, 16 C.A.3d 582, 41 A.L.R.3d 712, certiorari denied 91 S.Ct. 1205, 401 U.S. 977, 28 L.Ed.2d 327.

48.3 —— Admissions, instructions

Where, in prosecution for violation of provision of this section which makes it a crime for any person to participate in an act of oral copulation while confined in any local detention facility, evidence was introduced, during testimony of alleged victim, a 19-year-old county jail inmate, of statements made by defendant inmate during commission of various crimes charged against him, trial court was required to give instruction governing admissions because of dangers which were inherent whenever a witness was permitted to testify as to oral statements of an accused. People v. Campbell (1978) 151 Cal.Rptr. 175, 87 C.A.3d 678.

48.5 —— Intoxication, instructions

Jury instruction proposed by defendant on witness credibility should have been given where, as opposed to general instruction given by court, it pinpointed intoxication issue, which was basis of defendant's attack on credibility of prosecuting witness, and informed jurors of their options should they conclude that witness was intoxicated. People v. Barnett (App.1976) 127 Cal.Rptr. 88.

49.5 —— Other offenses, instructions

Trial court erred in instructing that evidence of other offenses was admitted on question of intent, where both parties had conceded that intent was not an issue, but inasmuch as once jury decided that witnesses against defendant were telling truth, intent obviously became a nonissue and error did not warrant reversal. People v. Haslouer (1978) 145 Cal.Rptr. 234, 79 C.A.3d 818.

50. —— Cautionary instructions

Trial court did not err in refusing defendant's offered instruction to effect that jury was to view with caution testimony of defendant's victims, in prosecution for sexually molesting children. People v. Haslouer (1978) 145 Cal.Rptr. 234, 79 C.A.3d 818.

50.2 —— Defenses, instructions

Defendant, who was charged with forcible rape and oral copulation by force and violence, was not entitled to proffered instructions on mistake of fact defense, which instruction was fully covered in another instruction or instructions relating to diminished capacity. People v. Guthrean (1980) 162 Cal.Rptr. 376, 102 C.A.3d 136.

50.5 —— Failure to explain or deny, instructions

In prosecution for violating provision of this section which makes it a crime for any person to participate in an act of oral copulation while confined in any local detention facility, trial court's error in giving instruction concerning when negative inferences may be drawn from a testifying defendant's failure to deny any prosecution evidence was harmless, because jury could not have been misled into believing that defendant had failed to do such, where defendant's denial was corroborated by other inmates present in same cell with victim, jury was instructed to disregard any instruction which applied to a state of facts which they determined did not exist, and prosecutor did not imply that defendant had failed to deny any prosecution evidence. People v. Campbell (1978) 151 Cal.Rptr. 175, 87 C.A.3d 678.

51. —— Interval between offense and complaint, admissibility of evidence

In prosecution of defendant for aiding and abetting in incidents involving oral copulation with minor by encouraging minor to engage in such act, prejudicial error occurred when trial court failed to instruct jury that it was necessary to find that defendant intended that her act would have effect of encouraging minor to engage in sex act with codefendant. People v. Yarber (1979) 153 Cal.Rptr. 875, 90 C.A.3d 895.

Failure to give an accomplice instruction in connection with charge of oral copulation did not result in a miscarriage of justice requiring a reversal, even if testimony of prosecutrix was insufficiently corroborated, and even if defendant's testimony raised an inference that prosecutrix was an accomplice, where it was highly unlikely that, had requested accomplice instruction been given, jury would have found that prosecutrix became an accomplice by consenting to oral copulation. People v. Mayberry (1975) 125 Cal.Rptr. 745, 542 P.2d 1337, 15 C.3d 143.

51.5 —— Failure or refusal to give instructions

Instruction in prosecution for rape or other sex offenses to the effect that such a charge is easily made and difficult to defend against is no longer to be given mandatory application; on the contrary, such an instruction is inappropriate in any context, and further use of such language is disapproved; overruling decisions to the contrary. People v. Rincon-Pineda (1975) 123 Cal.Rptr. 119, 538 P.2d 247, 14 C.3d 864, 92 A.L.R.3d 845.

In prosecution for rape and related offenses, error in failing to give then required instruction to the effect that such a charge is easily made and difficult to defend against was not prejudicial where there was no substantial probability that jury given the instruction would have been any more aware than the jury which convicted defendant that the key issue in the case was the credibility of the complaining witness. Id.

52.7 Findings

Where jury's verdict was on form prepared by court for jury's convenience which was given jury after they were told that they were required to determine whether victim's participation in alleged act of oral copulation was compelled "by force, violence, duress, menace and [or] threat of great bodily harm," jury's finding, in the conjunctive, that there was no "force, violence, duress, menace and threat of great bodily harm" could not reasonably be interpreted as a finding of one or more

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but not all of those elements but was properly interpreted as finding that none of elements were present. People v. Gottman (1976) 133 Cal.Rptr. 844, 64 C.A.3d 775.

In prosecution of two defendants for kidnapping, forcible oral copulation, forcible rape, and sodomy, trial court did not abuse its discretion in failing to find that it would have been physically impossible for defendants to have accomplished number of sex acts testified to by prosecutrix in the hour and a half in which she testified she was in defendants' automobile where not all acts were pursued to sexual climax. People v. Mayo (1971) 95 Cal.Rptr. 130, 17 C.A.3d 611.

55. Punishment

Trial court was within bounds of discretion in imposing consecutive sentences for counts of oral copulation and rape, inasmuch as such sentences were based on conduct divisible in time although arguably directed to one objective, and imposition of such sentences did not violate the proscription against multiple punishments for a single criminal transaction. People v. Kilpatrick (1980) 164 Cal.Rptr. 319, 105 C.A.3d 401.

Subd. (e) of this section permitting up to one-year imprisonment for engaging in consensual oral copulation while in a jail does not impose a punishment that is shockingly disproportionate to the crime so as to constitute cruel and unusual punishment. People v. Santibanez (1979) 154 Cal.Rptr. 74, 91 C.A.3d 287.

Multiple sex crimes against same victim during same incident may be separately punished. People v. Lopez (1979) 153 Cal. Rptr. 541, 90 C.A.3d 711.

Trial court did not abuse its discretion in ordering that 17-year-old boy who was adjudicated ward of juvenile court, be committed to youth authority upon finding that he had molested an 11-year-old girl and compelled a seven-year-old girl to orally copulate, where trial court explained in detail its reasons for selecting youth authority in preference to legally available alternatives, and it considered psychological needs of minor as described in reports on file, nature of offenses, which militated against allowing minor to remain in open facility until some treatment had been undertaken, and fact that no available local placement facility offered treatment especially for those predisposed to sexual offenses. In re James V. (1979) 153 Cal.Rptr. 331, 90 C.A.3d 309.

Provisions of § 264.1 permitting enhancement of punishments for acts committed by multiple defendants "acting in concert" were applicable in prosecution for rape, forcing child under age of 14 to orally copulate, and lewd and lascivious acts of child under age of 14, where evidence showed that there were two males and two young girls and that each male in turn sexually assaulted each girl; element of multiple parties acting in concert was sufficient whether assailants were two or six. People v. Gutierrez (1978) 145 Cal.Rptr. 823, 80 C.A.3d 829.

Where, after defendant, as part of a plea bargain, pleaded guilty to one count of oral copulation in exchange for dismissal of 14 other counts against him, and after defendant was committed to state hospital as mentally disordered sex offender, legislature amended provision of § 288a so that oral copulation was no longer punishable, defendant could not be sentenced for such crime when it was later determined that he was no longer a danger to the health and safety of others and criminal proceedings were reinstated. People v. Collins (1978) 145 Cal.Rptr. 686, 577 P.2d 1026, 21 C.3d 208.

Where all three counts charging oral copulation, robbery and kidnapping were part of the same series of events, but the robbery was an afterthought, not committed as part of the objective of sexual intercourse involved in the other two counts, sentence on the kidnapping count should have been stayed pending service of sentence on the oral copulation count. People v. Malone (1977) 138 Cal.Rptr. 395, 72 C.A. 3d 649.

Defendant, convicted of burglary of first degree, robbery of first degree, forcible oral copulation, and attempted murder of one victim, and first-degree murder of a second victim, could be separately sentenced for crimes committed against the two different victims and those sentences could not be made consecutive because punishment for murder was life. People v. Weir (1977) 137 Cal.Rptr. 814, 69 C.A.3d 79.

As to multiple convictions for crimes against single victim, charge of attempt murder, because of distinctly different criminal objective was separate and divisible from other offenses of burglary of first degree, robbery of first degree, and forcible oral copulation, for purposes of sentencing, but latter three were not separate and distinct from each other and arose out of one invisible course of conduct. Id.

Proscription on multiple punishment in § 654 did not preclude execution of sentences for both rape and forcible oral copulation, committed in the same time frame upon the same victim. People v. Robinson (1977) 136 Cal.Rptr. 127, 66 C.A.3d 624.

Where act of oral copulation was accomplished by defendant's companion with defendant's aid and assistance, against will of victim, and compelled by force and threat of great bodily harm, and jury clearly found factual requirements necessary to bring into play punishment-enhancement provisions of § 288b (repealed; now, this section) governing crime of acting in concert to commit an act of oral copulation, judgment of conviction was modified so as to delete additional adjudication respecting crime of oral copulation accompanied by force. People v. Barnett (App.1976) 127 Cal.Rptr. 88.

Suspended sentence and three years probation imposed on defendant for first-degree robbery, rape, kidnapping, and attempted oral copulation for breaking into victim's home, having intercourse with her, forcibly taking her to beach 2½ feet away, and attempting oral copulation did not violate § 654 proscribing double punishment for the same act. People v. Stender (1975), 121 Cal.Rptr. 331, 47 C.A.3d 413.

Imposition of death penalty against accused, who was convicted of simple kidnapping, sodomy, two counts of kidnapping for purpose of robbery, two counts of robbery and two counts of sex perversion, would have constituted cruel or unusual punishment. People v. Thornton (1971) 111 Cal.Rptr. 467, 523 P.2d 267, 11 C.3d 738, certiorari denied 95 S.Ct. 1118, 420 U.S. 924, 43 L.Ed.2d 393.

Even if act of oral copulation was part of defendant's course of criminal conduct, where oral copulation was not merely incidental to primary objective of sexual intercourse but was only performed after defendant was frustrated in initial attempts at sexual intercourse, act of oral copulation constituted a course of criminal conduct divisible from the rape; thus, concurrent sentence imposed with respect to conviction of oral copulation did not offend prohibition against multiple punishment. People v. Delgado (1973) 108 Cal.Rptr. 359, 32 C.A.3d 242.

Where defendant and his codefendant forced victim into their automobile, transported her distance of approximately three miles not only to rob and rape but also to subject her to "gang-style" series of assaults, and released her only after she agreed to work as prostitute, their conduct involved series of divisible transactions and had multiple objectives separate and apart

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from, and in addition to, objectives of other two crimes of which they were convicted, and thus defendant who received consecutive sentences for kidnapping, oral copulation and rape was not subjected to double punishment in violation of § 654. People v. Hunter (1971) 97 Cal.Rptr. 29, 19 C.A.3d 336.

Where defendants kidnapped victim for purpose of robbery and it was only after defendants discovered that victim had but $5 in her possession that they decided to compel her to commit oral copulation, they were properly convicted and sentenced for both kidnapping for the purpose of robbery and for oral copulation. People v. Beaumaster (1971) 95 Cal.Rptr. 360, 17 C.A.3d 996.

Where prosecutrix was forced into defendants' automobile and subjected to numerous sex acts, continued movement of automobile gave defendants opportunity to subject her to a number of different episodes of abuse and one defendant stated that he believed they would have to kill her, kidnapping was not merely incidental to sex crimes but also constituted a threat to prosecutrix' life and defendants could be convicted of kidnapping in addition to sex offenses. People v. Mays (1971) 95 Cal.Rptr. 190, 17 C.A.3d 611.

Conviction of perversion charges did not preclude conviction of lewdness charges arising from contemporaneous acts. People v. Edwards (1970) 90 Cal.Rptr. 475, 12 C.A. 3d 87.

Defendant's convictions for the offenses of incest, oral copulation and sodomy did not constitute a cruel and unusual punishment, and §§ 285, 286, and this section proscribing the offenses did not constitute an unconstitutional infringement by state on defendant's right of privacy. People v. Hurd (1970) 85 Cal.Rptr. 218, 5 C.A.3d 365.

Where robbery, attempted robbery and kidnapping of two girls to commit robbery were completed in alley before defendant ordered girls back into his automobile after which he drove to lonely hillside road where he committed sexual crimes, his sentences for two offenses of rape and for two violations of § 288a were not affected by sentencing on kidnapping to commit robbery counts. People v. Thomas (1970) 83 Cal.Rptr. 879, 3 C.A.3d 859.

Where robbery, attempted robbery and kidnapping of two girls to commit robbery were completed in alley before defendant ordered girls back into his automobile after which he drove to lonely hillside road where he committed sexual crimes, his sentences for two offenses of rape and for two violations of this section were not affected by sentencing on kidnapping to commit robbery counts. Id.

57. Review—In general

Fact that not guilty verdict from was not included as to count charging oral copulation of 11-year-old child did not require reversal of conviction where jury was properly instructed as to possible verdicts as to count charging forcible rape and jury was given form, which, in preamble, indicated that it related to count I but which reflected in the body that it related to crime of oral copulation and which provided for not guilty verdict as to such offense. People v. Stuller (1970) 89 Cal.Rptr. 158, 10 C.A.3d 582, 41 A.L.R.3d 712, certiorari denied 91 S.Ct. 1205, 401 U.S. 977, 28 L.Ed.2d 327.

59. —— Comments and conduct, review

Since defendant was acquitted on charges of oral copulation by force and rape, any impropriety in prosecutor's comment during closing argument in the effect that failure to convict defendant would give him license to commit rape on other women was not prejudicial. People v. Wiley (1976) 129 Cal.Rptr. 13, 57 C.A.3d 149.

60. —— Evidence, review

Since jury could have felt that victim initially resisted defendant's overtures but consented to intercourse after her pants had been removed, verdict which found defendant guilty of robbery with respect to $5 bill taken from victim's pants but acquitted defendant on charges of rape and oral copulation was not necessarily inconsistent. People v. Wiley (1976) 129 Cal. Rptr. 13, 57 C.A.3d 149.

61. —— Instructions, review

In prosecution for forcible rape, forcible oral copulation and burglary with intent to commit rape, error in giving portion of instruction concerning evidence of other crimes related to issue of "identity" was not prejudicial even though defendant's identity as perpetrator of offenses was not in issue. People v. Coleman (1979) 152 Cal. Rptr. 907, 89 C.A.3d 732.

62. Probation

Review of record showed that trial court did not abuse discretion in denying probation to defendant convicted of forced oral copulation and kidnapping. People v. Goodson (1978) 145 Cal.Rptr. 489, 80 C.A.3d 200.

63. School employees

The acquittal of teacher of criminal charge of sex offense did not bar trial court under doctrine of res judicata from rendering its own independent judgment that teacher had committed the sex offense warranting his dismissal by board of education. Board of Ed. of El Monte School Dist. of Los Angeles County v. Calderon (1971) 110 Cal.Rptr. 216, 35 C.A.3d 130, appeal dismissed, certiorari denied 95 S.Ct. 19, 419 U.S. 807, 42 L.Ed.2d 33.

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VERIFICATION

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, TELESFORO BAUTISTA, being duly sworn state as follows:

1. I am the Petitioner in the within action. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

Executed this 10th day of February, 1982 at Beverly Hills, California.

I declare under penalty of perjury that the foregoing is true and correct.

Telesforo Bautista
TELESFORO BAUTISTA

Subscribed and sworn to before me this 10th day of February, 1982.

Janice A. Daggett
Notary Public in and for said County and State.

OFFICIAL SEAL
JANICE A DAGGETT
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires OCT 31, 1985

PROOF OF SERVICE BY MAIL

(1013, 1013a C.C.P.(2), 2015.5 (C.C.P.))

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

AFFIDAVIT OF SERVICE BY MAIL BY ATTORNEY

I, JOSHUA KAPLAN, being first duly sworn, say:

That I am and was at all times herein mentioned, a citizen of the United States, employed in the County aforesaid, and am over the age of eighteen years; I further say that I am an active member of the State Bar of California, a member of Kaplan and Novodor, attorneys-of-record in this case, and am not a party thereto.

My business address is Penthouse Suite, 9171 Wilshire Boulevard, Beverly Hills, California 90210.

That on February 11, 1982, I served the within Petition For Writ of Certiorari To the California Supreme Court on the interested parties in said action by placing a true copy thereof in a sealed envelope with postage prepared, in the United States Mail at 9171 Wilshire Boulevard, Los Angeles, California 90210 addressed as follows:

GEORGE DEUKMEJIAN, ATTORNEY GENERAL, Christine C. Franklin, Deputy Attorney General, 3580 Wilshire Blvd. #800, Los Angeles, CA 90010

CALIFORNIA SUPREME COURT, 3580 Wilshire Blvd., #213, Los Angeles, CA 90010

COURT OF APPEAL OF THE STATE OF
CALIFORNIA, Second Appellate District,
3580 Wilshire Blvd., #301,
Los Angeles, CA 90010

JOSHUA KAPLAN

Subscribed and sworn to before
me this 11th day of February,
1982.

Notary Public in and for said
County and State

Opposition

IN THE

SUPREME COURT OF THE UNITED STATES

Office - Supreme Court, U.S.
FILED
FEB 19 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1520 Term, 1982

TELESFORO BAUTISTA,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

SUPPLEMENTAL APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOSHUA KAPLAN, a member
of KAPLAN AND NOVODOR

Attorneys for Petitioner

KAPLAN AND NOVODOR
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Beverly Hills, CA 90210

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Of Counsel

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APPENDIX "C" ..... Order of Court of Appeal of the State of California, Second Appellate District, Division One, of July 29, 1981 of Appeal from a Judgment of the Superior Court of Los Angeles County.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,	)
	)
Plaintiff and Respondent,	)
	)
v.	)
	)
TELESFORO BAUTISTA,	)
	)
Defendant and Appellant.	)
	)

2d Crim. No. 37511

(Super.Ct. No. A142203)

[Court of Appeal-Second Dist.
Filed July 29, 1981, Clay Robbins, Jr. Clerk]

APPEAL from a judgment of the Superior Court of Los Angeles County. Leonard S. Wolf, Judge. Affirmed.

Robert M. Nadel, under appointment by the Court of Appeal, for Defendant and Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant

Attorney General, S. Clark Moore, Assistant Attorney General, Edward T. Fogel, Jr., and Christine C. Franklin, Deputy Attorneys General, for Plaintiff and Respondent.

Telesforo Bautista was convicted in a jury trial of forcible sodomy (Pen. Code, § 286(c); count I), forcible oral copulation (Pen. Code, § 288a(c); count 2), and false imprisonment (Pen. Code, § 236; count III). He was sentenced to state prison for eight years and eight months[1] and appeals contending: "I. There was lack of substantial evidence to support the conviction. II. Court should have granted defense motion for mistrial on basis of prejudicial evidence presented to the jury. III.

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1. Six years on Count I, two years on count II, and eight months on Count III, the sentences to run consecutively.

Court erred in sentencing defendnt on different offenses involving the same act."

Viewed in the light most favorable to the judgment in accordance with the usual rule governing appellate review (People v. Johnson (1980) 26 Cal.3d 557, 576-578), the evidence, as it pertains to counts I and II, establishes that on the evening of March 8, 1979, appellant displayed a gun[2/] to Patricia J. and then forced her to drive with him to a motel. She testified that once inside one of its rooms, appellant repeatedly pointed the gun at her, advising "that he would kill me. The gun had a silencer on it so no one would hear anything" and if she "didn't do what he wanted me to do he would take me out in a parking lot and rape me and scrub my face up so bad nobody would ever

---

2. Though this gun appeared to be real, the one later seized at the time of appellant's arrest was characterized as a "replica."

look at me again or the men that were out there watching him, he would call them in and have them work me over." Thereafter, appellant tied Patricia up and over a period of several hours, sodomized her and forced her to orally copulate him.

The evidence relating to count III established that on the evening of March 9, 1979, Casey C. voluntarily accompanied appellant to a motel. However, when she prepared to leave, appellant suddenly drew a gun and threatened "to stick it up [her] vagina, blow it off, and watch [her] eyes pop out of [her] heard." He then forced her to commit various sex acts with him.

In defense to both offenses, appellant testified that Patricia and Casey consented to the sexual acts in exchange for money. He denied ever pointing the gun at Patricia but admitted he had displayed the weapon to Casey after she allegedly had attempted to steal his money.

In support of his first contention, appellant asserts that his version of the events should have been believed. However, the jury, as was its exclusive right to do, elected to credit the testimony of the two victims and reject that of appellant. Such determination is binding on appellate review. When so considered, the evidence is abundantly sufficient to sustain its determination that Appellant had committed all three subject offenses. (Jackson v. Virginia (1979) 443 U.S. 307, 318-319; People v. Johnson, supra, 26 Cal.3d 557, at p. 578.)

Appellant next contends that the court should have granted his motion for mistrial after it had admitted, over his objection, the testimony of prosecution witnesses who described the traumatic changes in Patricia's behavior in the weeks following the sexual assault.

"'... A motion for a mistrial is addressed to the sound discretion of the trial court. It may properly be refused where the court is satisfied that no injustice has resulted or will result from the occurrences of which complaint is made ... .'" [Citations.]" (People v. Romero (1977) 68 Cal.App.3d 543, 548). Here the challenged evidence went to an essential issue raised by Appellant's defense, i.e., whether his sexual conduct with Patricia was consensual or the result of force. As a consequence, its relevance and probative value clearly exceeded its potential for prejudice and appellant's motion was properly denied. (Evid. Code, § 351; People v. Watson (1979) 89 Cal.App. 3d 376, 385.)

Appellant's third contention has heretofore been rejected. Penal Code section 654 does not preclude separate punishment for acts of oral copulation

and sodomy arising during the same criminal incident where, as here, each offense was a separate and distinct act and was not incidental to or the means by which any other offense was accomplished. (People v. Perez (1979) 23 Cal.3d 545, 553; People v. Hicks (1965) 63 Cal.2d 764, 765-766.)

The judgment is affirmed.

HANSON (Thaxton), J.

We concur:

SPENCER, P.J.

LILLIE, J.

PROOF OF SERVICE BY MAIL

(1013, 1013a C.C.P.(2), 2015.5 (C.C.P.))

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

AFFIDAVIT OF SERVICE BY MAIL
BY ATTORNEY

I, JOSHUA KAPLAN, being first duly sworn, say:

That I am and was at all times herein mentioned, a citizen of the Unites States, employed in the County aforesaid, and am over the age of eighteen years; I further say that I am an active member of the State Bar of California, a member of Kaplan and Novodor, attorneys-of-record in this case, and am not a party thereto.

My business address is Penthouse Suite, 9171 Wilshire Boulevard, Beverly Hills, California 90210.

That on February 17, 1982, I served the within Supplemental Appendix to Petition For Writ of Certiorari To the California Supreme Court on the interested parties in said action by placing a true copy thereof in a sealed envelope with postage prepaided, in the United States Mail at 9171 Wilshire Boulevard, Beverly Hills, California 90210 addressed as follows:

GEORGE DEUKMEJIAN, ATTORNEY GENERAL, Christine C. Franklin, Deputy Attorney General, 3580 Wilshire Blvd. #800, Los Angeles, CA 90010

CALIFORNIA SUPREME COURT, 3580 Wilshire Blvd., #213, Los Angeles, CA 90010

COURT OF APPEAL OF THE STATE OF CALIFORNIA, Second Appellate District, 3580 Wilshire Blvd. #301, Los Angeles, CA 90010

JOSHUA KAPLAN

Subscribed and sworn to before me this 17th day of February, 1982

Notary Public in and for said County and State